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EMPTY JUSTICE:

One Hundred Years of Law, Literature and Philosophy

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EMPTY JUSTICE:

One Hundred Years of Law, Literature and Philosophy

Existential, Feminist and Normative Perspectives in Literary Jurisprudence

Melanie Williams
MA (Cantab), MA (Sussex) Eng Lit



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Williams, Melanie

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For Ernest Edward Hosking, Eileen Margaret Hosking
and Dr John Tudor Williams MB BS.

O wearisome condition of humanity
Born under one law, to another bound
Vainly begot and yet forbidden vanity
Created sick, commanded to be sound.
What meaneth Nature by these divers lawes?
Passion and Reason, self-division's Cause.

Sir Fulke Greville

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INTRODUCTION

PART I
GENERAL – INTERDISCIPLINARITY

If you are interested in links between the moral life – the life of values – and the formation of identity, female and male, this book should be of interest to you, the reader. If you are interested in tracing these issues of morality and identity through some aspect of law, literature and philosophy in the 20th century, it is hoped that this book will interest you still further. For lawyers, philosophers and literary theorists, questions of morality and identity impinge upon aspects of theory and doctrine; for lovers of literature such issues impinge upon the engagement between text, reader, meaning and existence itself. Thus in this text the reader will visit aspects not only of philosophy, law and literature, but anthropology, genetics and the psyche – areas of thought which at present jostle to challenge the vision of humanity inherited from classical thought still influential in the worlds of theory and doctrine. Do not shrink in anticipation of dense, abstract text, for this study attempts to place great focus upon extensive extracts from central works of fiction across the 20th century, according the most lively aspects of the literary texts themselves in the hands of the reader and juxtaposed with juristic material. Though the focus of this study is 'feminist perspectives' upon these texts, it is often only obliquely so, given that issues which concern the moral life and identity of one half of the population invariably concerns that of the other half. It is hoped, therefore, that reading will be an *inclusive* experience, however vehemently the reader may reject some connections and conclusions.

Before this book even begins, the title implies complexity and partisanship. The terms 'existential, feminist and normative perspectives' and 'literary jurisprudence' suggest elements of content which may create eager anticipation in some, automatic antipathy in others. It is hoped that neither camp will find the content conforms too comfortably to expectation.

It is hoped that a useful exposition and survey of current debate will be achieved in the Introduction. Particular emphasis will be placed upon 'locating' the multiple strands of thought now available to debate and how they might connect; it is hoped that as part of this process, the role of literature, of jurisprudence and of the progeny 'literary jurisprudence' can be located. But 'interdisciplinarity' has created such a welter of information, such migration and colonisation of concepts and terminologies that new problems are created. The transmigration of terms, words and phrases from one discipline to another frequently occurs without adequate explanation.

Scholars tend to be passionate about the world of ideas; their excitement derives from making connections. Intoxicated by the exciting potential for new ideas and combinations of ideas that interdisciplinarity creates, they rush to share their new vocabulary. Very shortly, this exclusive linguistic playground attracts new followers, who themselves adopt the vocabulary as part of their own; an exclusive community is created. Such exclusivity is probably not wholly avoidable: the information explosion creates a situation in which the scholar must be constantly alert to developments and possibilities and yet must select from this huge morass a conceptual arena that is both manageable and logically tenable. Two particular dangers lurk: that the overall linkage of concepts is somehow spurious, or at least less significant than is claimed (this is problematic: what do we mean by 'spurious'? Are we always equipped to judge the potential significance of a

connection?) and that the new exclusive community come to believe that 'their' understanding of a transmigrated term is shared by others. A political issue links to this problem: since theoretical developments of the last 50 years have acknowledged that words cannot have a settled meaning, it is almost politically 'incorrect' to offer definitions. Yet without them, a scholar coming to the field is encumbered in a different way. The very process of communication depends upon some degree of assumed agreement about meaning – even though debate may reveal that the initial assumption was optimistic. Indeed, although interdisciplinarity is gaining credence, scholarship is dogged by divisions originating not merely in ideological differences, but also stylistic ones; from location in subjectivity as well as subject location.

That the very *term* 'interdisciplinarity' should invite scepticism is a healthy response: the merger of disciplines can so easily lead to chaos. Sometimes, however, the term simply provokes hostility, founded upon the assumption that chaos is inevitable. It is of course quite possible, and sometimes necessary, to work within a single field with very little reference beyond the perimeter fence – within the conventional framework of 'contract law' or 'legal history', for example. Increasingly, however, there is a realisation that whilst the separation of disciplines continues to provide a functional utility – of containing a subject for practical purposes – it is permissible to challenge the perimeter more vigorously. In criminal law, for example, we have relied upon the MacNaghten Rules for 150 years to identify whether the accused can be adjudged insane. Psychiatry – the medical resource to which the criminal law has traditionally turned – has developed since M'Naghten was first formulated; but so too have psychology, neurophysiology and psychoanalysis, all disciplines which may offer further insights into the mind and yet disciplines traditionally less credible in the eyes of the criminal law. More generally, the traditional theoretical foundations of disciplines have been subject to fresh scrutiny. Such questioning can produce positive and negative outcomes: positively, old 'certainties' which on closer examination prove to have been built upon sand may be swept away; old boundaries built upon spurious lines knocked down. Negatively there is the danger that the baby will be thrown out with the bathwater: either that all theory is regarded as suspect – or even unnecessary – or that any combination of theory is as tenable as any other.

This danger has impacted upon feminist thought for two reasons in particular. First, much traditional theorising about how the world may be understood, about the difference between 'nature' and 'nurture', for example, has been exposed as containing inherent assumptions concerning gender whilst at the same time claiming objectivity and neutrality. This realisation has led some feminists to conclude that theory is either untrustworthy or inappropriate to feminist concerns; that feminism is concerned with 'real' life, not 'unreal' and unreliable theory. Secondly, the battle for female emancipation and equality has focused the attention of feminists upon *material* issues – the plight of the battered woman, single parenthood, unequal pay, poor career prospects – for some, feminism should continue to concern itself with these empirically observable, material inequalities. Yet not only should we continue to think about the value systems underlying material issues, we should also maintain a stance of neutrality in revisiting the potential for new developments in established theory.

In considering 'feminist perspectives' this book aims to bear in mind the gains and losses suffered by women *and* men in approaching the problem of identity: the only way forward seems to be to understand the shared stakes in reshaping community values. Women have suffered a long history of oppression and are still peculiarly vulnerable to the continuation of oppression. But the prevailing values fostering this situation affect and distort male experience as well. In Western society men have experienced both the benefits *and* burdens of patriarchal assumptions – that they are 'natural' leaders, superior thinkers, the most able providers. Women now experience a degree of emancipation, yet it is a piecemeal and incompletely lived emancipation. All such developments occur against the backdrop history, of contingency, of change: with the post-industrial revolution it is ever more the case that young men suffer and live in a state of redundancy. Already in some quarters this creates hostility to female emancipation – that women 'take' men's jobs. In general, girls' educational performance in Britain has improved compared with that of boys'. Unmarried girls and women with babies feel less obliged to marry/abort/put their children up for adoption; thus they add to the lone parent statistics. Female emancipation in the Western world has been short-lived yet already it may be pilloried as the 'cause' of social ills. But in the disruption to old established values men have played a part as well. For every child born to a single mother there is a father; it may be that he is unwanted by the mother, it may also be that he walks away from the responsibility. Statistical surveys suggest that women adapt better to life after divorce than men. It may be that women have a greater expectation of happiness in marriage and are more likely to abandon marriage if this expectation is unfulfilled, but it may also be the case that the statistics reflect a genuine release from unhappiness, an unhappiness imposed upon women by marriage. Whatever the case, it seems clear that as men, women and children we can benefit from the re-evaluation of ourselves deriving from the disruption of old orders.

Now more than ever before, we can draw upon the range of ideas and information available to us in our search to better understand what it is to be human. Philosophy – our search for meaning through reason; law and politics – searching for order through reason; medicine – our search for healing through reason; even literature – searching for meaning through the interplay of reason and imagination, can all draw upon disciplines until very recently excluded from their proper realm of consideration: anthropology, history, neurophysiology; all those 'ologies' now flourishing having survived the latter decades of the 20th century. The difficulty is to treat all information with proper circumspection – again, enthusiasm can turn an exciting idea or connection into an article of faith, particularly (as mentioned below) in the context of a period of human experience in which the extraordinary access to an unprecedented flow of information has been accompanied by a concomitant loss of faith in divinities.

This century has witnessed the dessication of many established institutions – of marriage, nationality, of the Church, even of less visible institutions such as the belief in 'history' or the inevitability of 'progress'. Fundamental difficulties arise from the erosion of belief in Man as a generally noble and superior creature and from the erosion of belief in God, from the erosion of beliefs about the relation of man to woman. These developments create crises of identity at many levels. If we are not descended from the noble savage, but – as Darwin was once lampooned for suggesting – simply the group known as primates, what does this tell us about our relation to notions of nature, of

nurture, of the moral life? If we cannot be sure of the existence of God, but must instead at least *conceive* of ourselves as 'cosmic orphans' what are the implications for our moral life, for the way we organise our society, our laws?

Feminists and philosophers refer to 'patriarchal values', indicating an overwhelming, coherent and potent collection of cultural influences traceable through virtually every form of thought and expression. Evaluation of the effect of such values has been a dominant theme in much 20th century scholarship, producing bitter dispute, derision and at times, revision. Reviewing the effects of such values produces particular difficulties – of objectivity, of feasibility. Whilst anthropological studies may shed light upon rare alternatives, humankind has little experience of such alternatives: the social organisation derived from patriarchal assumptions has been such a very dominant force. Philosophy as a discipline is possibly one of the least tainted sources of thought in this regard; philosophical questions tend to attempt objectivity and be common to humankind (even if, at times, the venue for debate has seemed inaccessible) – questions concerning the nature, or existence of good, evil and moral responsibility, of individual and community. For most of recorded history, such issues have been shaped and controlled not simply by a patriarchal, but also a theological world view.

Doubts about the existence of God have a long history, but until recently, the 'world view' promoted by religion and Man's place within it, has been a dominant force in Western culture. Religion provided answers to every question – how the world began, why we are here, notions of good, evil, retribution, punishment, forgiveness, moral responsibility. It promoted a hierarchical model of existence – with God at the top, Sovereign as divine ruler (and papal sovereignty supreme for Catholics) leading naturally to a descending order of existence amongst men. 'Evidence' could be found in religious texts to support concomitant beliefs – also 'discoverable' in religions other than Christianity – that 'other' races were inferior, women inferior, that killing could be done in God's name. Religion provided not only a world order, a certain view of humankind including the relation to self, the psyche, the body, the world, but also power in the hands of a very few individuals – the power to control events and disseminate ideas, legitimating the order, promoting stasis rather than progress in many fields of thought and lending legitimacy to many forms of prejudice. The law and legal institutions have played a vital role in upholding and perpetuating these values. In addition, the world of ideas itself has an hierarchical history, with some claiming natural and 'epistemic' precedence; battles for dominance – such as that between 'scientific' and 'religious' explanations for existence; some relegated to an alternative or 'second league' and some newly forged through social change. Throughout, philosophy – whether people recognised it or not – formed a backbone to the world of ideas and a framework for questioning ideas and the material conditions and institutions of life. Yet although philosophy had an ancient history of its own, access to it was the preserve of a privileged few who, more often than not, mediated through the already distorting lens of religious belief. But if 'religion is (or was) the *opium* of the people' and thus easily used as a source of social and political control, philosophy, capable of producing similar notions of order, may act as a natural irritant – encouraging a questioning of ideas and independence of mind.

Yet, given that, certainly for the last 100 years (we can trace destabilising influences to the dominant order as far as we like, but the Enlightenment, the Renaissance, political science – Hobbes, Locke are clear contenders, as well as the industrial revolution), there has been a growing popular or mass awareness that the world order might not be as told, there has also been a developing tendency to question related ideas. What is our relation to the world? What is 'reality'? If we are here, not by design, but through cosmic incident, how do we relate to 'reality'? If we are 'cosmic orphans', what degree of responsibility do we have for our actions? Should we rely on science, psychiatry, genetics, social theory to tell us? Or politics, philosophy? What is the role of the law in all this – how should the law mediate between competing sources of information and between individual and community notions of order?

The recurrence of the word 'emptiness' as a subtext to each title and chapter of this book is really a convenient shorthand to indicate a linked theme running throughout – that all of the books in their various ways touch upon the danger, the threat, the question of the moral void opening up once old certainties have been displaced. There is a common challenge confronting the characters in all the books – that of how to reconstruct a value system when recognising that the status quo is less than stable – and a 'crude' way of identifying the threat – and the promise – posed by this challenge is to refer to the 'emptiness', the 'gap' that it represents. In broad philosophical terms the challenge may usefully be considered in relation to two visions of our relation to the world. (Though these visions do not entirely 'agree' with one another, they nevertheless share a visionary perspective of mankind struggling in darkness towards rational development: as focal points they are both of great value.) The first, most ancient and fundamental, is the image of 'Plato's Cave' – Plato's model of the human conundrum created for mankind in trying to reason his way through the competing influences, beliefs and prejudices which continually shape his experience, towards reliable and logically defensible conclusions. This timeless image retains its value as a guiding image when embarking upon any attempt to assess the value of ethical models and systems. The second is the basic concept linked by the term 'existentialism' (noting however that this term has suffered a great deal of metabolisation for various purposes).[1] A key and fairly universally accepted notion which has come to be related to the term 'existentialism' is the assertion that the

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1 Warnock (Warnock (1970), p 132) argues:

> Existentialism, under whatever name, with its insistent emphasis on the centrality within human nature of the capacity for constructing alternatives and choosing among them ought to be read and taken seriously … The methodology of Existentialism … consists in a perfectly deliberate and intentional use of the concrete as a way of approaching the general …

Warnock describes, however, that for Sartrean existentialism, the adoption of Marxism led existential thought into an impasse. Scruton argues that this need not be the inevitable outcome (Scruton (1994), p 468):

> Sartre's … attempt to retain a pure and absolute freedom which surrenders to no moral law sets him at an impassable distance from the human world. There is no passage out of that freedom into the realm of human comfort … If this is the price we pay for freedom, then perhaps freedom is too costly … If there is transcendental freedom, then it is surely right to see it as Kant sees it: as the foundation of a morality of law …

Moreover, Matthew Coniam (Coniam (2001), p 20) argues that the British existential thinker Wilson has not as yet been properly recognised for managing 'to winch the worldview of humanist existentialism free of the impasse of despair in which it had been reluctantly abandoned by Sartre and Camus'. As becomes clear in the consideration of many of the texts central to this book, 'despair' does not have to be the inevitable position derived from 'existential' awareness.

relation of the individual to the world is 'interactive', that the world, the universe is not a great 'womb' which will parent, nurture or direct us; that we must take responsibility for the world as we create it, and the enormity of this responsibility is reflected in the threat of moral chaos, the moral void, the 'emptiness' that opens up before us in facing this image – whether we meet or fail the challenge. The image of the cave and the challenge posed by the 'existential' vision are both deeply relevant to the use of the novel as a forum for ethical modelling, both in terms of the novel form (which can be used as an accessible means to 'model' the cave, its shadows and the 'existential' void, whilst maintaining the accessibility of this fabular model to explore philosophical questions), and in terms of the novel content, as a means by which we may explore the cave and the moral questions raised by our existence in a world of disrupted belief systems.

Jurisprudence and literature, though activities of diverse origins and aims, are both concerned with such questions and in attempting to explore them are joined in their shared reliance upon philosophy. In addition, both law and literature can be regarded as cultural activities which both *reflect* prevailing values and *problematise* those values. In considering 'literary jurisprudence' this book will consider the diverse resources of law and literature as simply that – a mirror to ourselves.

LAW, LITERATURE, PHILOSOPHY, FEMINIST PERSPECTIVES

This introduction will attempt to explain and draw together the various strands of thought contributing to the piecing together of how we might understand the construction of identity and moral agency. Some of these strands are already linked in the scholastic domain, although the strength and legitimacy of those linkages is a matter of dispute. Philosophy can be seen as a common thread running through most disciplines, as the basis of a fundamental rationality in our quest for meaning. Traditional jurisprudence is a clear philosophical progeny; critical legal studies, the rebellious and often defiant (some would say 'illegitimate') child of jurisprudence sometimes less obviously so. Feminist theory impinges upon almost every area of established epistemology, yet charts an uneasy path (perhaps necessarily) between philosophy and politics. Social and political theory, often regarded as a coterminous melding of fields, shares and originates in the birth of philosophy. How History conceives of itself is essentially a philosophical question. Literary theory, too, draws upon philosophy and is conscious of its special perspective both in terms of links between philosophy and language and of the contribution of literature to the worlds of politics and philosophy. As we search for additional fragments of the puzzle that is ourselves, genetics, psychiatry, psychology, psychoanalysis and anthropology can all contribute insights, and indeed contemporary developments in genetic studies, neurophysiology, primate studies, have revived questions concerning the origin and existence of notions such as 'free-will', 'moral agency' and the alleged opposition between 'nature' and 'nurture' – all crucial questions in the worlds of philosophy and jurisprudence. Indeed, the range of ideas is so tantalising and so diverse, it is truly difficult to chart a tenable course amongst them. At any one period of time, certain ideas will captivate and dominate the intellectual stage; to some extent – however we may wish it otherwise – this will be attributable to 'external', contingent factors of our time. A fascinating field of study within critical legal studies at

present is that of psychoanalysis and law; post-Freudian developments in theory renew the quest for answers through theorising the psyche. The law tends to rely upon established institutions as adjuncts to itself, especially those which claim to derive from scientific objectivity and empirical observation: psychiatry and latterly, psychology have both been relied upon to serve the purposes of law in its tentative forays into the psyche. Whether or not lawyers are aware of the fact, 'founding' psychoanalytic theory – Freudian theory – has been accepted into mainstream psychiatric medicine. Modern psychoanalysis is not so embraced: however interesting and potentially relevant its ideas, it remains on the periphery of legal theory, for reasons to which we will return.[2] Literary theory too has been much taken up with psychoanalytic theory as a resource. Locating 'law and literature', or indeed 'literary jurisprudence', is dependent upon demonstrating a place within all these strands.

In visiting these strands of thought, a brief attempt will be made in the second part of this Introduction not only to explore linked ideas but also to explain linked and migrated terminologies. For some readers such explanation will be, or at least will seem, a superfluous and unnecessary excursion; however there is sufficient evidence of misunderstanding, antagonism and simple ambiguity for such explanation to be timely. No doubt the attempt will invite commentary on the errors or oversimplifications inhering in the explanations; that is not *necessarily* a negative outcome.

This book *does* hope to revive and excite interest in philosophical and jurisprudential questions using the extensive, bold and accessible resource of literary texts as a stimulus to so doing. There are certain approaches the book does *not* take:

It does *not* purport to give a comprehensive survey of feminist theory and feminist topics – the approach is rather to reflect tangentially upon issues raised by feminist theory. Comprehensive coverage of feminist theory and debate is already provided by other texts, not least those in the '*Feminist Perspectives*' series. This tangential approach quite deliberately aims, not to 'marginalise' feminist discourse but, on the contrary, to demonstrate, through the 'focal' literary and jurisprudential texts of each period, how *pervasive* feminist issues are for *all* persons and all belief systems. In one sense, a 'readership' I imagine centres upon those men and women for whom feminist perspectives may seem distant and perhaps, 'unnecessary'.

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2 A creative and seminal text at this 'crossroad' of disciplines – a critical legal melding of law, history and psychoanalysis which applies psychoanalytic theory directly to the institutions of law, Goodrich (1995) addresses, from a *psychoanalytic* perspective, many of the issues approached in the present text with a philosophical strand. Nevertheless, Goodrich's approach forms an insistent undercurrent to the ensuing chapters, especially in relation to the subtle and pervasive forces unacknowledged by law:

> … a critical reading of law starts with its images, figures, and tropes and does so for the reason that these features of this face of law, its accidents, ornaments, or incidents, represent that which cannot be said directly, that which cannot be proved or seen, but must be taken on faith or not at all. In less metaphysical terms these symptoms of an 'other scene' or unconscious of law are also the signs of the divisions or differences that constitute this place, this subjectification, this law, or the beauty and the devastation of this objectivity, this particular order of social being. In endeavouring to expose the role of the image and the specific *antirrhetic* in which early doctrine wrote of the identity of common law, the present study has concentrated upon a limited number of foundational images, particularly those of citizenship, place, and gender … Where positivized conceptions of law are concerned to use concepts of logic and system to mask or deny the difference, the power that founds law, a psychoanalytic critique of law is attentive precisely to the differences or others enfolded in law … (Goodrich (1995), p 240).

It does *not* undertake a comprehensive review of those literary texts most directly associated with feminist literary critique – although some will be mentioned briefly in this Introduction. Rather, the chapters will consider texts more generally representative of stages in (mostly British) literature of the 20th century. With a theme common to all – that of anxiety concerning identity and the moral life – it is intended that the texts will reveal *tangential* insights into links between mainstream jurisprudence and feminist perspectives.

It does *not* provide a comprehensively *philosophical* foundation to legal and literary studies, but attempts to provide approaches to central philosophical ideas in a digestible form. Nor does it approach the linkage between the worlds of literature, philosophy, jurisprudence and feminism via the complex and multi-layered media available in '*Critical Legal*' works, although reference will be made to such work.[3] Rather, the aim is to juxtapose central literary texts alongside core jurisprudential movements.

Thus it is expected that *extensive* grounding in the various epistemological strands, especially in feminist theory and debate, will be sought elsewhere.[4] However, for readers unfamiliar with feminist debate, some context will be provided. Meanwhile, the following should be noted.

Feminist critique has provided valuable new insights and challenges to traditional and dominant epistemologies, not least those in law. *Material* issues such as equality (including parallels with 'equality' struggles in terms of race and class) have been extensively explored. Other material issues – often directly linked to such 'cultural' inequalities, include rape, domestic violence, pornography, the public/private divide, abortion and reproductive issues generally, capacity, 'personhood', the social contract. In addition to such 'material' studies, feminist critique has also experienced heated debate in terms of the appropriate *theoretical* foundations for feminist thought. Briefly, this has produced contrasting 'schools', most notably, 'liberal' feminism, 'radical' feminism, 'cultural' feminism and 'postmodern' feminism, each producing differences of perspective in terms of appropriate beliefs and objectives for feminist thought. For example, liberal feminism has aspired to achieving equality with men. For radical feminists, however, focus upon such aspirations simply perpetuates the fundamental *ideological* system which 'naturalises' and renders universal those masculine values shaping a distorted feminine experience. For many radical feminists, seeking 'equality' – to be the same as men, is a mistake; women should be seeking ideological change which accommodates and celebrates feminine *difference* rather than 'sameness'. A major source of contention in this debate is that of 'essentialism' – for if women claim that they have a fundamentally different human identity, an essence which cannot be equated with masculine identity – this poses several difficulties. Positively, it may be argued that affirmation of such identity would allow women to claim a *locus* for the reshaping of society so that 'the feminine' is recognised as a positive social and political force; this in turn might hold benefits as yet unexplored in terms of social and political organisation. Negatively, the assertion of an *essential* feminine identity holds the threat that women may be defined and thus limited by the essences proclaimed, especially since women are

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3 It is the broad church of the 'critical legal' movement which has often provided a sympathetic and accessible forum for unusual disciplinary approaches.

4 For an excellent review of themes and intersections in current feminist theory, see Conaghan (2000).

peculiarly vulnerable to identification with 'biological' roles – *essentialism* lies perilously close to *fundamentalism*. An additional difficulty resides in the identification of which characteristics might be 'essentially' feminine. Such *theoretical* questions reverberate constantly back into the *material*, for material questions gain a different perspective according to which model of identity prevails. Should women subscribe to the 'liberal' philosophical view of free speech and censorship, when the pornography 'empire' impinges differently upon men and women? Which feminine 'identity' needs greater protection – that which maintains free and equal access to pornography since women too are, we are told, sexually 'liberated', or that which seeks the censorship of pornography because any such freedom is outweighed by the general loss of feminine freedom which a more aggressively sexual culture entails? Or is the key issue anyway one of aggression and power rather than 'sexuality' *per se*? The issues reflect not only upon feminine identity, but also masculine identity, not only upon 'natural' sexual differences – and how we locate the 'natural', but also differences nurtured or constructed by cultural belief and practice. It is because the ultimate question becomes one of this *locus* between 'nature' and 'nurture' for both women *and* men, that the ensuing chapters have adopted a tangential approach. In addition, this issue of 'shared' concerns and assumptions serves as a reminder that many of the questions considered by 'classical' philosophy and jurisprudence – the source of moral life, of moral agency, the pursuit of goodness, the meaning of 'truth', of 'justice', 'subjectivity', 'reality', 'existence'; of how we might shape society, the meaning of 'legality', of the individual, State and the role of law – are universal questions which pertain to factors common to mortal human occupation of this planet. The fact that such issues may *impinge* differently upon the sexes does not make them any the less common for both. The focus of this study therefore places works of fiction for each period – all works of philosophical content – alongside contemporaneous philosophical and jurisprudential material. In so far as the study is steered by a concern to highlight possible 'feminist perspectives', focus will be maintained upon the linkage between such perspectives with those of philosophy generally.[5]

'Law and literature' as a theme most commonly conjures the figures of Dickens and Shakespeare; certainly both form rich sources of material for new perspectives upon the life of the law. But 'law and literature' offers extremely wide opportunities for research, not only in terms of texts, but in terms of approach.[6] Ian Ward has written of the clear differences inhering in the law *in* literature approach, compared with that of law *as* literature. The danger with *any* such combination of subjects is that one aspect becomes horribly sacrificed to the more dominant aims or drives of the other. Thus references to

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5 Noting however that (Annan (1991), pp 527–28):

> The philosopher is not superior to other human beings. He [*sic*] differs from most of them because he deals in abstractions. But that does not mean he is qualified to give practical advice. He is no more qualified than the carpenter to tell men and women how to live ... The 'rationalists' are wrong to think there is only one language in which everything can be discussed. There are in fact many modes of experience or 'voices' or 'language' which we use when talking about experience, and we speak them with different degrees of skill, learning, sensitivity and originality ...

6 A short list must include Aristodemou (2000); Dimock (1997); Fish (1989); Posner (1995); Ward (1995); Weisberg (1984, 1992); White (1985, 1990). A reader may readily access and survey the diverse and stimulating material in the field. This textual list is merely an indication of the influence and variety offered by such interdisciplinary work.

'the law' may be so loosely derived that it bears little resemblance to 'the law' as it is commonly understood, as institution or idea. Equally, the literary source may be so metabolised in the service of distant and unrelated concerns as to promote a distortion of the work as art or as commentary. It may be felt that the ensuing chapters fall prey to such charges, especially in the adumbration of 'feminist' perspectives to texts which – on the face of it – do not align themselves with such perspectives in terms of theory or content. Most obviously, the charge may be levelled at Chapter 5, which deals with literature from the 1960s and considers how the texts may provide commentary upon debate on the 'abortion question' at that time. Neither text is remotely concerned with the issue of abortion, nor is any suggestion advanced that the author of either text betrays sympathies with either side of the debate. But in so far as each text is concerned with the construction of identity and moral choice, each provides fresh philosophical commentary which impinges on such debate. In order to maximise both *fidelity* to the original literary texts and the *opportunity* to use this collection as a *resource* for discussion of a literary-philosophical-jurisprudential nexus, each chapter provides *extensive* quotations from the texts themselves. These quotations bear witness to the quality and sophistication of literary engagement with philosophical questions; notionally *each* quotation read in isolation may also be used as a focal point for ethico-legal discussion.

LITERARY JURISPRUDENCE

The fact that 'law and literature' as a study can provide a vehicle for many different approaches to legal research – new critiques of legal history or legal rhetoric, for example – has already been mentioned. Naturally, care must always be taken to ensure that the different *purposes* of the 'institutions' of law and of literature are paid some recognition – wholly unlikely correlations of 'fiction' with 'fact' will need justification (to this must be added the *proviso* that in law, as in life, the 'divide' between 'fact' and 'fiction' is anyway not always so clear). Such thoughts aside, it remains the case that literary sources can provide new insights regarding claims to a world of legal 'fact' as well as legal 'discourse'.

From the very general *genus* 'law and literature' we may claim the term 'literary jurisprudence' as a distinct species. Here may be found a concern, as in jurisprudence itself, not just with the 'facts' of law, but also with the relation between 'fact' and 'value'. That is, *philosophical* enquiry into possible rationales and links between the 'material' world (the world rather too loosely considered as the world of 'fact' but including not only our physical, material conditions, but also our experiences *pursuant* upon those conditions) and the world we construct from the non-material realm of *ideas*, the *values* – principles, morals, ethics – through which we attempt to mediate the contingent physical world and our own capacity for choice, good or ill (as will be seen in the ensuing chapters, these two 'worlds' – of 'fact' and of 'value' – are less divisible than may be supposed). Using literature – fiction – as a means of exploring the relations of fact and value is arguably a tenuous exercise. Using literature to explore fact and value in relation to law brings about a potentially uneasy alliance between *three* worlds – law, literature

and philosophy.[7] For (it may be said) whilst philosophy and law are committed to the pursuit of reason, literature must be an *unreliable* cousin, the progeny of art, imagination, fantasy, ego. Whilst signalling this concern, three 'justifications' for using literature in the exploration of jurisprudence may be raised. First – and this relates in particular to the texts studied in the chapters which follow, *and is a key reason for choosing them* – literary texts may engage with the worlds of fact and value, the link between material life and the moral life, sometimes with full as much gravity and critical awareness as is achieved in mainstream philosophy. Again, we may argue about *purposes*, but as *stimuli* to debate, literary texts can prove an invaluable and challenging resource. This brings us to the second point, which concerns the *abstracted* character of jurisprudence. For not only does jurisprudence sometimes *seem* 'unapproachable' or even *irrelevant* because of the abstracted nature of its discourse, it may run the risk of *becoming* 'irrelevant' by dint of its abstraction. The debates may become so 'internal' as to be caught within their own closed circuits. Juxtaposing jurisprudence alongside literature can not only assist in making these difficult discourses more accessible and alive, it can also, as with the particularities of life itself, 'test' the *viability* of jurisprudential claims.[8]

Lastly, as already indicated, though the world of fiction may be distinguished from law and philosophy as a world of fantasy, imagination and ego, this distinction is not to be awarded exclusively to literature alone. Though each derives from markedly different disciplinary origins, all are ultimately intellectual and cultural productions, susceptible to divers influences and, sometimes, obtuse aspects of authorial construction. This is not to say that they are 'the same', that fiction-is-jurisprudence-is-fiction; it is a briefly outlined reminder that there are numerous points of contact between them.

Nevertheless, the concern about the 'validity' of such an alliance should be constantly borne in mind. Indeed, at this preliminary stage, a caution may be sounded concerning utilisation of these literary texts. They are, first and foremost, literary texts; they do not promote themselves as 'philosophical' texts. Yet this study treats them as 'philosophical' as well as 'literary' sources. Through the chapters there is no repeated 'disclaimer' in this regard – no timely reminders to the reader to remember the hybrid origin, to bear in mind the putative or 'mongrel' claim to philosophical pedigree. It is for the reader to consider this issue and its relative impact in terms of the threat, or promise, to rationality and common sense.

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7 The historical is implicated as well. As Kreuger notes (Kreuger (1999), p 445):

> What then can literary history contribute to narrative jurisprudence? We might begin by historicising narrative jurisprudence itself, locating it within an ongoing relationship between ethics and aesthetics, reason and sentiment … Kathryn Abrams associates the turn to narrative with the postmodern critiques of objectivity in the history of science and philosophy, replacing objective proofs with strategies of persuasion … But it could be argued that the rational and aesthetic, scientific and sentimental, are not in fact antagonist categories, but mutually dependent ones … aesthetic reasoning can be shown to play a central role in the formation of the modern democratic state.

8 Minda ((1999), p 353):

> The boundaries and foundations of law and literature movement, once defined by the 'law in literature' and 'law as literature' distinction, have thus become less clear as these different literary perspectives have been shown to be merely different ways to translate a text. And, as Richard Weisberg's remarks make clear, new narrative forms and new identity groups have shifted the debates of law and literature to new theoretical translations.

Reservations aside, the strongest justification for the approach taken in this present text is that indicated by our second 'justification' – that of *accessibility*. Philosophical enquiry is *clearly* of immediate and fascinating interest to some; many people, however – scholars included – feel excluded, alienated or simply impatient with such debate. Much – almost all – jurisprudence and philosophy adopts some foundational analogy, metaphor or narrative account of possible correlations between the worlds of fact and value. Indeed as already mentioned, a most ancient and enduring example of such a metaphor is that of Plato's Cave. The image of the cave gives a cogent account of the very construction of the worlds of fact and value, of physical life and moral life. As living creatures we are in bondage to the facts of our physical existence, including mortality. The extent to which we are *determined* by these facts is, for Plato a matter of spiritual growth for, beyond this physical, contingent world of brute 'matter' (and even though our 'technological' world is ever more diverting and absorbing of our daily energies) is a world of 'forms' – a world of *values* – for Plato the *real* world. This *real* world is, for Plato, obscured by matter, by physical existence; we are diverted by matter, often willingly so. We may abandon ourselves to it: the parallels between theology and philosophy are clear. It is ironic then that this book sets out to employ literature – arguably the progeny of matter, of indulgence, of entertainment – in order to enliven an engagement with form, with the world of values.[9] But, just as the metaphor of the Cave can be a medium for engaging with complex philosophical issues, arguably the extended and elaborated 'metaphor' or analogic site provided by fiction can be a lively and intelligible 'space' for philosophical reflection.[10] In philosophy and jurisprudence such recourse to metaphor, analogy or narrative in order to explore moral questions is identified as 'practical ethics' modelling. It can prove a most effective source of philosophical enquiry.

Some reservations concerning such utilisation of fiction would undoubtedly have been voiced by Plato himself. Iris Murdoch (Murdoch (1992)) provides a wide ranging discussion of this issue. She notes that Plato did not 'take the art object as the image of the good' explaining:

> Great art can be a potent source of illusion … literature is even more dangerous than painting since it delights in presenting bad men as interesting and attractive … Writers, not exceptional for virtue, understand and sympathise with mediocrity and egoism and cannot perceive goodness … Art fascinates us by exploring the meaner, more peculiar aspects of our being, in comparison with which goodness seems dull … in sympathising with a fictional character we abandon ourselves to emotional excesses which weaken our better nature … (pp 9–13),

adding that, in current popular culture 'the violent man is the hero of our time'. Yet this salutary warning against literature as 'contaminant' aside, we may remember that Plato's

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9 Murdoch ((1999), p 88):

> Plato … seems to have come to believe that all art is bad art, a mere fiction and consolation which distorts reality …

10 The French theorist Irigaray critiques the Cave as an elaborate escape from and abandonment of the mother (Barnett (1998), p 87). Nevertheless, the imaginary space created by the metaphor of the Cave survives this reading as a potent image for the universal problems of existence. Murdoch ((1999), p 94):

> Metaphors can be a mode of understanding, and so of acting upon, our condition. Philosophers merely do explicitly and systematically and often with art what the ordinary person does by instinct. Plato, who understood this situation better than most of the metaphysical philosophers, referred to many of his theories as 'myths'.

metaphor of the Cave is *itself* a fiction and a fable, portraying Man in his struggle towards light and enlightenment. And whilst it is true that the alliance of base human appetites with materiality has made the violent man 'the hero of our time' it may also be argued that exploration of the 'meaner, more peculiar aspects of our being' can be undertaken not with prurience, but in a sober evaluation of who we are.[11] In the light of which, 'goodness' will not seem 'dull', but its pursuit and attainment considered via a more informed and global view of the moral agent, the carrier of the will to goodness.

Murdoch recognises, cautiously, the potential of art in our struggle for self-understanding and its role in the moral life. Great art 'renders innocent and transforms into truthful vision our baser energies' (Murdoch (1992), p 8) and she notes:

> Human relationship is no doubt the most important, as well as the first, training and testing-ground of morality; and common sense as well as Freud emphasises the influence of family life, of which Plato does not speak (p 17).

Nussbaum is more certain of the relevance of the novel in illuminating our understanding of ourselves and our relation to the good, especially in the context of contemporary life:

> Indeed, by enlisting the reader as a concerned participant ... novels take our common humanity for their theme, implying that what is at issue is not merely some idiosyncratic event that actually happened, but a possibility or possibilities for human life ... novels conduct a philosophical investigation into the good of a human being. Their many more concrete Aristotelian contributions – their rich exploration of the noncommensurability of the valuable things, their concern for particular context-sensitive judgments ... If we wish to develop a human ethical philosophy along Aristotelian lines, I suggest that we would do well to study the narrative and the emotional structures of novels, viewing them as forms of Aristotelian ethical thinking (Nussbaum (1990), p 390).

Moreover, though the worlds of fiction should not be regarded wholly uncritically and are certainly not the arbiters of 'ultimate' truth or authenticity, nor should fiction be relegated *en masse* to classification in the 'diversionary' world, wholly distinguishable from the 'real' world. 'Fiction' and 'reality', like 'fact' and 'value' hold points of confluence and, as Murdoch warns:

> The distinction between fact and (moral) value ... may result in a diminished, even perfunctory account of morality, leading (with the increasing prestige of science) to a marginalisation of 'the ethical' (Big world of facts, little peripheral area of value) ... This ignores an important aspect of human existence, the way in which almost all our concepts and activities involve evaluation. A post-Kantian theory of morals: survey all the facts, then use your reason. But in the majority of cases, a survey of the facts will itself involve moral discrimination ... Innumerable forms of evaluation haunt our simplest decisions ... in many familiar ways, various values pervade and *colour* what we take to be the reality of our world ... (Murdoch (1992), p 25).

The warning is as pertinent to the status of conscientious legal theory as it is to art.

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11 An anatomy of humankind as opposed to a peep-show. In his discussion of 'Mechanisms of Shame and Guilt', Bernard Williams (Williams, B (1994), pp 220–21) refers to:

> ... an example originally suggested by Max Scheler and discussed by Taylor ... of an artist's model who has been posing for a painter for some time and comes to feel shame when she realises that he is no longer looking at her as a model but as a sexual object.

FEMINIST LITERARY JURISPRUDENCE

Several literary texts of central relevance to the exploration of feminist perspectives in literary jurisprudence recommend themselves; clear contenders might include *The Taming of the Shrew, Ruth, Anna Karenina, The Clergyman's Daughter, A Taste of Honey, The Man Who Loved Children, The Color Purple, The Handmaid's Tale, Beloved, White Teeth* – potentially the list is vast; the potential ramifying outwards evermore as one realises the 'feminist' aspect in *every* text. Some have already been the focus of extensive and fascinating scholarship.[12] Maria Aristodemou provides a rigorous exploration of how literature can forward our capacity to imagine new realms of social and ethical possibility in her study of Angela Carter (Aristodemou (1999)). In an article discussing the ambit of law, literature and feminism, Ian Ward explores cultural implications in the link between events and linguistic constructions of them, specifically of rape in *The Handmaid's Tale* (Ward (1994)); such books clearly signal a commitment to the linkage of law and literature in understanding feminist issues. In *Law in the Gospel of the Female Messiah: Myth, Gnosticism and Finnegan's Wake* Gearey (1998) demonstrates the profound and revolutionary potential in a less transparently 'feminist' text. Moreover, Aristodemou, in her recently published *Law and Literature – Journeys from her to Eternity* (Aristodemou (2000)) deals with the foundational interplay between literature (and other aesthetic media), philosophy, myth, feminism, ethics and the unconscious in law.[13]

Three issues may be noted in relation to the texts chosen for *this* study. Firstly, though some of the texts are clearly written with a 'feminist' perspective in mind, this is not invariably the case. Rather, the texts have been chosen for their common concern with the theme of identity, in particular, anxiety concerning individual moral identity – an 'existential' anxiety when cast against the questionable moral values which obtain in the

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12 Yet not necessarily given the consideration they deserve. As Resnick makes clear, the 'feminist' still battles to enter the establishment:

> … some changes have occurred, such as the assignment of works of fiction by women that now appear on a few reading lists, mostly in courses taught by women … Yet the changes are only a trickle, and women as professors of the metier, as critics shaping the discourse, remain unrecognised as authoritative by teachers within the domain … (Resnick (1999), p 722).

Yet the messages of feminism hold value for the entire community – that is the spirit in which this book has been written.

13 Aristodemou is an inspiring work, a cogent account of the rationale underpinning such interdisciplinary exploration. In particular, her opening chapter provides a wonderfully concentrated exposition of links between the *genres* of law and literature, and her discussion, throughout the book, of the play between the feminine, mythology, law and the unconscious is fascinating. There are interesting points of confluence between Aristodemou and the present work – most notably both begin with a quotation from Ballard, both end with elaborations of similar images from classical thought – Aristodemou discusses a possible ingress for Ariadne in the Cretan, now academic, labyrinth. The present text pursues a similar quest for the location of woman in relation to Plato's metaphor of the Cave. A major conceptual distinction between Aristodemou and the present text lies in the utilisation of these images in terms of constructions of gender identity. For Aristodemou, the repressed feminine is replete with a distinct promise, a distinctive and essential identity for future ethics and law. In the present text, this position is resisted. Stylistically, Aristodemou moves seamlessly between philosophical, literary and psychoanalytic critiques, so commenting upon the unspoken life of law. In contrast, the present text explores the territory in more concrete form – with reference to specific legal topics and cases, discrete jurisprudential arguments. Arguably, the two approaches are equally defensible and create tenable contrasts.

broader cultural context.[14] In addition, the texts represent stages in the development of thought – as well as *genres* – across the 20th century, thereby providing convenient touchstones for engagement with contemporaneous legal and philosophical debate. Clearly, the world of ideas is not invariably reflected in simple chronological trajectories, but may traverse both space and time; nevertheless this loosely chronological and moral perspective provides a useful tangential plane through which feminist issues may be surveyed.

As a result of these considerations it may be noted, secondly, that the texts were not sought with a view to reflecting the particular contributions of female authors. Undoubtedly a survey of the development of feminist perspectives through the medium of feminine authorship could have proved a worthwhile framework for study. But for *this* study, the theme of prevailing moral values and how such values might reflect *either* directly or tangentially upon feminist perspectives, offers an opportunity to approach the often subliminal operation of prevailing values in mainstream culture. As will be seen, this sublimation is often addressed by the texts themselves, although interesting strands of ambivalence lie beneath such conscious confrontation. Thirdly, the texts are in the main British in origin, although the first and last chapters utilise the texts of JM Coetzee, whose work well reflects the nexus between 'local' and 'global' politics in terms of race, gender and 'identity' towards the close of the 20th century.

PART II
A PRELIMINARY MAP: TEXTS AND TERMINOLOGIES[15]

As the chapters concerning each period unfold, certain issues of genre, philosophical, legal and literary, become evident. Although much of the material is self-explanatory, some preliminary remarks concerning the conceptual and linguistic frameworks for each period are offered at this introductory stage, especially bearing in mind the fact that the topics and texts cut across disciplinary boundaries.

Chapter 1 begins with two texts from the year 2000; provocative, sometimes shocking, both hold a mirror to aspects of contemporary morality and contemporary life. In terms of *genre*, both signal a return to simple narrative style, though with a political, allegorical edge as well as a deeply psychological one: the political and psychological profiles are very much the creatures of our time, rendered *visible* by this re-worked *genre*. Chapter 2 returns to the close of the 19th century; it is extensive, its length originating from two separate studies of legal topics within the text.[16] Both chapters concern accessible and intelligible materials in terms of literary and ethico-legal issues.

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14 I have not concentrated the study simply upon those writers known as overtly 'existential' in their projects – Kafka, Camus, Sartre. One reason is that the texts chosen demonstrate an *emerging* existential awareness across the 20th century. Another is that, as predominantly British texts, they resonate clearly with broadly British philosophical and legal developments.

15 In this section, words and phrases of key importance to the overall text are reproduced in bold print. This may seem superfluous to need, but it is intended as an aid to the route taken through interdisciplinary language, allowing that travellers may hail from different points of origin.

16 These studies have appeared as two separate articles – both Williams, M (1999a and b).

Chapter 3 however marks a shift in terms of both *genre* and philosophy. Early 20th century '**modernist**' literature no longer seeks to present the coherent and harmonised narrative familiar from the '**realist**' *genre* of the 19th; it experiments instead with the shifts and fragmentations experienced *within* individual subjective experience.[17] Most notably, such studies in the 'streams' of individual consciousness permit engagement with prevailing *philosophical* debate concerning the possible role of consciousness itself in the construction of reality. Thus the literary *genre interacts* with the philosophical moment; this in turn redounds with surprising symmetry upon the constructions and identities erected in the court of law. It should be noted that 'modernism' as a *literary genre* must be distinguished from the use of 'modernism' or '**modernity**' as a frame of reference in philosophy and jurisprudence. In those contexts, the term has come to be used very freely, but its use reflects a common thematic awareness and wariness: retrospectively it may be seen that 'modernity' claimed rationality as a new religion: 'The Enlightenment's conception of scientific rationality as the key to continuous and universal progress in our struggle with nature is the ultimate metanarrative of modernity (O'Neill (1999), p 18).'[18] The development of this critical awareness ramifies most forcefully towards feminist theory, wherein scepticism results from occupation at the margin of epistemological claims.

In addition to literary 'Modernism', Chapter 3 also introduces another much occupied term, that of **positivism**. In philosophy, 'positivism' can be traced to Auguste Comte, but also to Carnap and Ayer, whose **logical positivism** – concerned to assert that the empirically tested use of language and propositions in the construction of 'reality' be closely and meticulously understood and examined – was to influence **legal positivism**. Both forms of positivism reject **metaphysical** philosophy, which attempts to approach the problem of 'reality' via 'abstract' concepts which place no reliance upon the physical or empirical world. Legal positivism therefore eschews the inclusion of nebulous 'moral' ingredients (in contrast to its main opponent, natural law theory) in identifying the 'legitimate' legal system and rule of law (the reader may recall here Murdoch's point regarding the separation of fact and value). This polarisation of material, physical 'reality' versus incorporeal, *meta*physical 'reality' reverberates through the texts of law, literature and philosophy; its widespread influence upon all emerges forcefully in this chapter.

In Chapter 4 the predominance of early 20th century positivism in all its forms is displaced with the texts of the 1940s, where law and literature both return to the putative claims of the *meta*physical world view. With the physical world in ruin, Man's mastery of it in doubt, some rejection of corrupt *matter* – materialism – appears and *form* is re-examined. *Form*, as *meta*physics, or 'values', bears a complex relation to the physical: for both law and literature, – history – contingent events – as expression of *fact*, and history as *ideology* illustrates the difficulty of separating fact and value. Jurisprudence at this time

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17 Sinfield ((1989), p 189):

> The Modernist artist's situation was encapsulated in the term 'alienation'. This Marxist term – the only one not 'driven from polite conversation', says EP Thompson ... was taken into existentialism by Sartre and then robbed of its political dynamic as existentialism was co-opted for Cold-War ideology.

18 The uses of the terms 'modernism' and 'modernity' is complex – every generation considers itself modern and applies this self-centredness to the world of ideas. See Scruton (1994), pp 501–13.

heralds a return to **natural law**, the legal theory which insists that law is intelligible only when a *moral* content is included – a position still in contest today with the positivist commitment to analytically grounded, value-neutral constructions in theory. 'Natural' philosophical strands both in legal and literary texts of the period demonstrate a response to contemporary *ideological* upheaval, yet whereas influential legal theory posits a rational return to the moral order of natural law, literature is more circumspect. The literary texts suggest that the world of 'values' is all too easily subverted, and this is echoed in the nexus between individual and State, public and private, explored in fiction and law.

Chapter 5 visits two works of fiction from the 1960's and reviews how their very different approaches make concerted efforts to consider the relationship between the worlds of fact and value in *constituting* individual identity. Is the moral agent truly 'free' to shape the world of values, or is s/he simply more, or less, receptive to such values? It is argued that these texts present a maturing of the **existential** evaluations of the moral agent which are incipient in all the texts. Their contrasting models of free-will and agency illustrate, complement and in part challenge the 'existential' account of modern life as the road to autonomy and free-will, and law's claim that such notions are gender-neutral. In addition to the contemporaneous debate on abortion, the texts also provide an oblique glance at the feminist discourse concerning the '**ethic of care**'. Can a construction of 'feminine reasoning' as different and caring be sustained in the realm of moral philosophy? *Should* it be sustained? Does such 'gendering' of identity trap women in a circle of 'nature' and 'nurture' or forge new imaginative realms for women in moral philosophy?

One literary text only is examined from the 1980s. In Chapter 6, *Foe*, a critical *tour de force* in itself, presents a powerful imaginative journey for the female interlocutrix in challenging the co-creators of historical and political 'space' for her effacement from both. Woman, absent from the island of *Robinson Crusoe*, here insists her presence both to 'Foe' – the guardian of history and the written word – and 'Cruso' the holder of the civic mantle in the story of the **social contract**. 'Social contract' theory, the accounts of civic power and organisation fundamental to political philosophy and jurisprudence, is challenged on grounds of mythologisation, specifically with regard to issues of race and gender but also the entire historical account.

In one sense therefore this book needs no critical commentary for it is *itself* a most stark critique. Yet a central *reason* for its critical power is its location in the literary *genre* of **postmodernism**. Like modernism before it, the term 'postmodernism' has experienced various colonisations and is perhaps the most abused, contested and undermined of concepts.[19] Legal theorists, where they employ the term, display perhaps as much variation in usage as might be found in 'mass' cultural adoption, and sometimes the least concern for meaning. Morrison states (Morrison (1997), p 13):

> Modernity – the period of social history since the enlightenment in the 18th century – is founded partly on the belief that it will be possible to attain full self-consciousness concerning social reality. Mankind will analyse the world, gain secure knowledge(s) and use these to build a just society. Postmodernity can be defined as the realisation that such a

19 See Lacey (1994).

> belief is radically flawed. The more knowledge we gain, the harder it becomes to tell a master story …

As Morrison indicates, this outlook threatens to undermine *all* claims to knowledge, meaning, truth, inducing fears of the collapse of *all* values – of nihilism. Recognising the *impasse* that such a descent would impose, recent theorists (Morrison included) have 'salvaged' theory by asserting that postmodernity simply permits healthy scepticism; that awareness of the 'relativity' of all values need not preclude the selection of *some*. Yet some circumspect jurisprudes would assert that nothing has changed – that healthy scepticism and awareness of relativity has *always* been the by-word of good scholarship, and that the word 'postmodernism' is simply used as an impenetrable shield against all criticism – the most dogmatic for being the least transparent. Certainly the claim made by *some* definitions of the postmodern – to a new virgin territory of scepticism – seem inflated given the structures built into traditional rationality which attempt to be part of a disciplined discursive world, responsive to reasoned argument (that the discourses may in retrospect prove partial is simply part of an incremental critical process; that some are more resistant to critique than others proves either that they are *formally* or substantively robust in terms of rationality. Critical theory, especially in its adoption of 'radical' or 'marginal' perspectives may demonstrate that such robustness, especially in relation to formal rational structures, derives from subliminal and therefore less easily exposed aspects of dominant discourse. Critical theorists of modernism and 'modernity' recognise similar sublimations). However this dispute within jurisprudence may now stand, recourse to the explication of postmodernism in *literary* theory arguably offers the most rigorous and text-sensitive account, and *Foe* is a cogent demonstration of this textual possibility, of the ethical linkage between 'postmodern poetics' and political, including feminist, theory. Literary theory begins, like Morrison's account, with a recognition that a 'postmodern' perspective must be aware of the partisan nature of any 'master' narrative. Crucial to the suppression of the multiplicity of other voices that a claim to mastery entails – in any moment of speaking, of writing, of *judging* (and here the sometimes complacent attitude of 'conservative' scholars is matched by the equally misplaced posturing of self-proclaimed 'radicals') – is an ethical consciousness, an ethical *conscience* concerning the *inevitable* arrogation of power. And such ethics does not merely entail the cultivation of integrity in the formal and substantive aspects of discourse, but of *humility*. Claiming the right of voice or pen, achieving advancement to the seat of judgement or of proclamation, derives from convergences of chance, fortune, nature and nurture, full as potent as wit, talent, fortitude. Achieving constancy to the ethical conscience that this implies, the vigilance to self that is humility, the vigilance to other that is integrity, requires active cultivation of moral and discursive **reflexivity**. To be *reflexive* in every utterance or judgement is to give cognisance to the possible imperfection, subjectivity, *exploitation* involved in one's own very act of pronouncement, uncomfortably but necessarily 'bending backwards' towards the point or person of reference. The ethic of religion – 'there but for the Grace of God go I!' – becomes a universal requirement in the little, as well as 'big' relation of self to other. Location of this reflexive voice – this ethical voice – is achieved *par excellence* in *Foe* and is made possible by adoption of the prose style nominated 'postmodern poetics'. Attached to the feminine voice, offering some substance

to the requirement of self-reference in the veiled Rawlsian legislator, reflexivity in *Foe* implicates the feminine interlocutrix, the jurisprude, the judged.[20]

Though the pivotal focus of this project is broadly philosophical in the location of identity and the moral agent, the somewhat unexpected persistence of certain epistemological assumptions invokes the submission of a chapter *preparatory* to the conclusion. Chapter 7 comprises a brief survey of those foundational concepts implicated by the texts of law and literature – of '**human nature**' and **nurture**, of links, suggested implicitly from Chapter 1 onwards to **anthropology, genetics,** and the **psyche**, in understanding the possible factors that must be borne in mind when philosophical assertions are made and when feminist perspectives are sought, in seeking links between identity and the moral life. Arguably, interdisciplinarity paves the way to a reconsideration of any number of epistemological influences. In considering anthropology and genetics in particular, it may be argued that this book simply returns to the *faux* 'certainties' of science, a route properly recognised as fraught with dangers, not least of a still potent 'ultimate' authority. The response to this objection is simply that traditional assumptions regarding human nature, whether in jurisprudence or philosophy, tap subliminally into scientific models of humanity. In response to this phenomenon, the text draws upon less complacent anthropological models from recent studies, if only to demonstrate the *unstable* ground of such assumptions. Secondly, this book attempts to treat seriously the alternative perspectives raised by the literary texts: the 'anthropological' view is urged strongly by the very first text, forming a modern frame for the texts which historically precede it. And finally, since the assumptions underlying our view of the human agent gleaned from classical thought prove so insubstantial, whilst modern science continues to test the boundary between 'nature' and 'nurture', a visit to modern science before reconsidering philosophy, in the Conclusion, seems apt.

Finally, the Conclusion considers some current strands of thought connecting moral philosophy and identity. Identifying the theme common to all the texts – the '**existential**' consciousness and anxiety increasingly apparent throughout the 20th century, the Conclusion reflects upon the possible resonance between this existential mindset and **normative** structures – the development of 'inner' selves responsive to moral life – the selves for whom the material facts of life, the world that 'is', predicates more than the sating of appetites or the search for oblivion. Both law and literature join philosophy in

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20 The American political theorist John Rawls published an hypothesis for future development of social contract theory, which attempted to address the problem of subjective interpretation of justice for all by positing a 'veil of ignorance' – an attempt to achieve neutrality in any positing of an equitable system of justice. Feminist critiques of Rawls, as will be seen, have formed a major contribution to debate. Lacey identifies several flaws in such readings; speaking of Okin's depiction of Rawls' original position as not really about choice from a detached standpoint 'so much as choice from the point of view of everyone', she notes:

> Principally it raises questions about the possibility of empathetic judgement, which are exacerbated by Rawls' stated conditions of ignorance. It assumes that a single individual can 'get inside' the experiences of others, imagine what their lives might be, *without ever having actually to listen to anyone else*. There is a danger. The logic of Okin's position seems to lead to participatory democratic models in which people learn to speak and listen to each other, and take seriously each other's views: translated into the terms of the original position, it conjures up a super-imaginative being (Lacey (1998), p 65).

I am not claiming that the text of this book (Chapter 6) resolves this problem, simply that it helps to illuminate it for any putative claimant to juristic power.

considering how the moral agent comes to being, how the world of 'is' becomes a world of 'ought'. It is an inescapable world, a world borne of, and evolving through, community. And communities are composed of children, of men, of women, whoever they may be.

THE YEAR 2000 – THE EMPTY CITY: JG BALLARD'S *SUPER-CANNES* AND JM COETZEE'S *DISGRACE*

> Sit back and think things through. The twentieth century ended with its dreams in ruins. The notion of the community as a voluntary association of enlightened citizens has died for ever. We realize how suffocatingly humane we've become, dedicated to moderation and the middle way. The suburbanisation of the soul has overrun our planet like the plague. 'Sanity and reason are unworthy of us?' No. But a vast illusion, built from mirrors that lie. Today we scarcely know our neighbours, shun most forms of civic involvement and happily leave the running of society to a caste of political technicians ... They pay lip service to community values but prefer to be alone. 'Isn't that odd, for a social animal?' Only in some ways. *Homo sapiens* is a reformed hunter-killer of depraved appetites, which once helped him to survive. He was partly rehabilitated in an open prison called the first agricultural societies and now finds himself on parole in the polite suburbs of the city state. The deviant impulses coded into his central nervous system have been switched off. He can no longer harm himself or anyone else. But nature sensibly endowed him with a taste for cruelty and an intense curiosity about pain and death. Without them, he's trapped in the afternoon shopping malls of a limitless mediocrity. We need to revive him, give him back the killing eye and the dreams of death. Together they helped him to dominate the planet ... (*Super-Cannes*, p 263).

This quotation reflects a view of civilised man that departs radically from that adopted by classical political, and legal, theory and doctrine. Certainly it is difficult to deny many of the suggestions made: of a dream in ruins, of civic apathy, of asocial patterns. The development in the quotation of a need to return to 'the killing eye and the dreams of death' places the character speaking it – a corporate psychiatrist with a skewed and grand vision of applications for his art – a man for whom the moral life is dead and the opportunity to mastermind a large scale social experiment is all. Yet the rationale of mankind he offers – with utilisation of the biological nomenclature '*homo sapiens*' diverging from that normally adopted in philosophy – of the 'reformed hunter-killer of depraved appetites', partly rehabilitated but with 'a taste for cruelty and an intense curiosity about pain and death' is a sharp yet feasible departure from the vision nurtured in law. The reliable, stable 'reasonable man' for whom depraved appetites are harboured only in the thoughts and actions of deviant minority 'others' squares poorly with the generic 'reformed hunter-killer'. Instead, this text suggests, the boundary between 'natural curiosity' regarding deviance and adoption of deviant behaviour is blurred, for society is engaged in a complex web of activities and interests which implicate us all, passive and active. Whatever potential for the pursuit of goodness might have obtained has become subsumed by consumerism and transient gratifications.

In this chapter, the texts selected for reflection upon the moral life in the year 2000 present the reader with stark and sometimes shocking conceptions of modernity, so much so that there may be a natural recoil, a desire to turn away from the texts as themselves gratuitous or prurient. The reader is urged, however, to give proper consideration to their message, for both present concerted explorations of the modern psyche, explorations which challenge the inadequacies of traditional models.

The stimulus for this chapter arose largely from the clear mismatch between the conception of our society as civilised, and the brutal realities which underpin it, realities which appear to be 'circled' while remaining unmet by political theory and 'rights' discourse. Feminist scholarship has often concentrated upon particular aspects of this brutality – of sexual oppression and exploitation. The 'Year 2000' texts engage a broader exploration of the issues, extending the critique and invoking a conjunction of disparate vocabularies and disciplines – in all suggesting that the issues are not simply 'feminist' but communal matters of universal well-being. Two aspects of *Super-Cannes* are particularly striking – the use of a radical critique of modern man beginning not with the 'man of reason', but with *'homo sapiens'* – both conjoining humanity and wisdom, yet with radically different cultural antecedents and implications. Secondly, the text provides a frank anatomisation of unacknowledged regions of the human psyche, and the co-ordination of the psyche with physiological drives and responses. *Disgrace* also explores the lack of 'fit' between our inner and outer selves – specifically the text traces how the credible master narrative of the enlightenment scholar can co-exist with an equally credible – but ethically untenable – interior narrative of self-legitimation, of mitigation. Together, the texts provide a provocative and accessible adjunct and challenge to traditional political, legal and philosophical scholarship.

The regulation of the individual and the community through law is an extremely tenuous exercise. The law must be seen to uphold some elementary moral vision which relates realistically to human nature. Yet human nature is a mystery, and social, political, penal policy all perennially battle with conflicting views of its content. It is a largely unacknowledged fact that within any given society, each generation is caught up and participates in the ongoing 'experiment' in social engineering that is community life. 'Social engineering' indicates large-scale co-ordination, but of course the model is qualified to varying degrees, by the collision of conflicting forces and interests and the impact of the contingent world. The legal world attempts to mediate these conflicts and contingencies whilst maintaining that elusive moral vision. Human 'nature' presents the law with the most troublesome component of all: forging a path between an overly idealised view of man and an overly debased view, whilst properly upholding some basic moral aspirations for the survival of society, is a formidable task. Traditionally, law has adopted a view of human nature derived from theology and political theory; latterly this view has been supplemented, albeit inadequately, by medical science. Yet the mysterious core remains: of the relationship between this elusive 'nature' and the effects of environment – of 'nurture', of the existence and extent of 'free-will', of the boundary between 'normal' and 'ab'normal, of how gender, power, identity intersects with these. Meanwhile, law must conduct its business, must oversee and cultivate forms of individual and community regulation and, given the insoluble mysterious core of nature and the need to place regulation above understanding, the law will tend to perpetuate the old.

The law continues to hold with a dualist, polarised view of mankind drawn from classical theory, of a majority of right-minded, free-willing individuals, a minority of deviant others. Feminist and other forms of critical theory have already questioned these assumptions in some depth; in addition as law struggles to adapt itself in the light of its own sometimes outmoded and incomplete picture, tensions can be observed in the formulation of doctrinal models. This was exemplified recently in discussion of homicide,

provocation and 'the reasonable man' in the case of *R v Smith*[1] where, to quote Archbold (in Richardson (2000), pp 19–60) the House of Lords recognised:

> ... the notion of the reasonable man was becoming increasingly unreal, as, for example the reasonable man with abnormal immaturity and attention-seeking personality ...

adding that:

> ... the *ratio* of the majority decision is by no means easy. Their Lordships were, however, adamant that there remained an objective element to the defence. They appeared to be of the view that not all characteristics were potentially relevant, but it is impossible to say with any confidence which are and which are not. Further, at least two of the majority (Lords Hoffman and Clyde) seemed to be suggesting that in directing a jury a judge need no longer use the expression 'the reasonable man', notwithstanding that is the test enacted by Parliament ...

In Chapter 2, a comprehensive history of the notion of the reasonable man is undertaken, especially in relation to the doctrine of provocation. For the moment, it may perhaps suffice to say that the concept of the reasonable man has occupied a central role in legal doctrine, reflecting and entrenching the vision of ourselves created in classical political theory. Such wholesale encryption has however sat uneasily with the widely idiosyncratic responses displayed by individual miscreants to contingent events. The notion of reasonableness, and especially of a knowable embodiment – the reasonable man or woman – has far reaching implications not simply with regard to how the reasonable action and reaction is construed, but concomitantly, what such constructions reveal about underlying belief systems. Ultimately therefore, the construction of reasonableness and the reasonable man ramifies into notions of responsibility, agency, credibility, normativity.[2]

To supplement or readdress the inadequacies of the reasonable man with the model offered in *Super-Cannes*, utilising a convergence of anthropology and psychiatry (instead of classical philosophy with piecemeal adoptions from medicine) may be far too radical a step to contemplate. Yet if the mystery at the heart of human nature is more effectively breached by such an approach, it should at least be given some attention. Initially however, close consideration will be given to these literary texts which disturbingly, yet seriously, throw down the gauntlet to classical man.

The extensive quotation at the beginning of this chapter identifies the key philosophical challenge held at the heart of the remarkable *Super-Cannes*. Where, as we shall see, *Disgrace* deposes the delusive superiority created by culture and rationality and posits a violent reordering – where the formerly oppressed gain power and exact payment, *Super-Cannes* explores a model of society in which abuse of the oppressed is integral to the *functioning* of the dominant culture. The difference may be ascribed to demography – that *Disgrace* deals with post-colonial turbulence, whereas *Super-Cannes* is set in a supranational corporate cantonment. Here, sexual and racial oppression is enacted upon a contained human flotsam at the edge of the enclosure. Yet do these

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1 *R v Smith* [2000] 4 All ER 289 (HL); Session 1999/2000: www.parliament.the-stationery-old199900/ldjudgmt/jd000727/smith-1.htm.

2 See, eg, the discussion of the search for the responsible subject in Lacey (2001).

differing visions simply reflect logistics – that black South Africa holds not only the power of enfranchisement, but that of numbers, whereas the oppressed of *Super-Cannes* are a containable disenfranchised minority? Or do the different viewpoints reveal divergent positions regarding the instrumentality of oppression – on the one hand that it is an almost unavoidable facet of human nature or, that it is the product of a transient and unsustainable hegemony. Another reading of the books can, however, evince the conclusion that each harbours aspects of both visions; that *Disgrace* describes a transition which may result in egalitarian or oppressive practice, whilst *Super-Cannes*' depiction of integral oppression can be a dystopic caution rather than inevitable universe; to some extent the models simply recast the nature/nurture debate. Whichever view is adopted, both books clearly reflect upon important social and ethical questions and both anatomise the confluence between – in social terms – civic contract and chaos and atomistically, citizen and sociopath.

At the end of the 20th century, the ability of fictional texts to confront and critique the dark underside of Western liberal values is truly potent. Nevertheless, literature throughout the century displays some disability (albeit diminishing) when infiltrating the adroit rationality underpinning predominant culture. Such early assays are necessarily piecemeal; the critiques subject to the strictures of their time in terms of *understanding* the myriad aspects of the cultural behemoth, *absorbing* the full implications of the existential horizon and, most of all, *expressing* that understanding and absorption in linguistic forms hitherto unsayable. This is not to say that cultural congratulation is in order, or that a reassuring 'teleological' outcome is at hand. For the message is in some ways bleak, and any shadowy teleology an object of suspicion, the belief that our time is better, or worse, often a matter of subjective stance. Yet some greater degree of self-knowledge appears to be in sight and with it the possibility of more balance in an understanding of what it is to be human, of what we are dealing with and why, when we consider the person, the community and the law. Both books chosen from the end of the 20th century reflect a deep concern with corrupt practices and with the 'normalisation' of such practices. Both question the moral standing of present social trends and make suggestions as to where such trends may lead. In *Disgrace*, although the immediate context is that of post-apartheid South Africa, there are clear implications for 'divisive' politics in general, especially where the politics derive from the 'selective enlightenment' of Western liberalism. In *Super-Cannes* this viewpoint is explored through a model of a present/near-future dystopia in which international corporations have the power of mini-states and as such dispense with the refinements of community politics. Together the books throw prismatic images upon contemporary values. We cannot know whether the warnings they implicitly contain are fully justified – certainly the power of *fin de siècle* apprehensions is strong – but in an age seduced by a less than critical view of itself, an age of consumerism, of undreamt freedoms and instant gratifications, a note of warning seems timely. We may see liberal politics emerge as a tool of adaptive transformation, its action matched by the integrity of aspiration, or we may not: envisioning the broader ethical implications of current piecemeal values at least sustains an aspiration of integrity.

SUPER-CANNES

The quotation at the beginning of this chapter is taken from a central character in *Super-Cannes* – Penrose, a psychiatrist whose observations regarding human nature have clear implications for social and political theory. Although he *may* be characterised as an irrational zealot, his rationale the product of his own history (analogous to Freud), his hypothesis concerning the *nature* of human nature derives from plausible observation. Asserting that 'the notion of the community as a voluntary association of enlightened citizens has died for ever' and linking this to a 'suffocating humanity' is disturbing in a time proclaiming itself as the age of human rights. As the passage indicates, the notions of 'community' and of 'citizenship' are not reflected in practice; his anthropological assessment of human nature – of the 'taste for cruelty' and 'intense curiosity about pain and death' derive in the book from plausible 'empirical' as well as theoretical observation. The mini-state that is *Super-Cannes* becomes a metaphor for society, a petri-dish in which aspects of humanity, conveniently disregarded in the actual world of lubricious politics, demand inspection: to consider human nature is to consider a capacity for depravity as well as enlightenment, for evil as well as for good.

In discomfiting play with contemporary values, the book suggests that the pursuit of profit is the determining factor in understanding human motivation. In the multi-corporate State that is *Super-Cannes*, Penrose is charged with responsibility for the welfare of its executives. He realises that poor productivity, poor immune responses, 'sick building' syndrome, depressed libido – the multitude of ailments besetting the highly educated and elite workforce – all disappear when the executives take part in deviant and violent forays into the poorer quarter:

> ... the run-down chief executives with their hives and depression were sane and civilised men. Maroon them on a desert island after a plane crash and they'd be the first to perish. Any perverse elements in their lives would have to be applied externally, like a vitamin shot or an antibiotic ... a carefully metered measure of psychopathy ... some depressed CEO ... then a senior manager with Hoechst ... He saw a woman tourist in Cannes being mugged by an Arab youth and went to her rescue ... he gave the fellow a good beating ... he felt buoyant and confident again. Not a trace of depression ... (p 259).

'Libido' – the complex interplay between the sexual self, repressed violence and expressed creativity – is a central theme, although the word is cautiously avoided, perhaps because of its prescriptive overtones. This is of course a perennial theme for Ballard, for whom clear-eyed examination of human capacities through a combination of imagined dystopias and unimaginable autobiography has ensued from his adolescent blooding.[3] Thus in witnessing a robbery, the narrator, a kindly, fair and reasonable man, describes 'hair prickling on the nape of my neck' whilst:

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3 Ballard's childhood experiences of war, including a Japanese prisoner of war camp, demonstrated to him the gamut of human capacities – for gratuitous violence, for indifference, for kindness. His texts can be seen as an exploration – often unusually detached – of these factors in the light of developing 20th century society – see, eg, Ballard (1994). It is interesting to consider how this informs his view of human capacities and human nature, when contrasted with the somewhat antiseptic anatomies produced in philosophy.

> A potent odour lifted from my crutch, a deep hormonal call to violence. My penis thickened, and my scrotum gripped my testicles like a fist. I remembered my erection after my first solo landing at the RAF flying school ... (p 222).

Such physiological commentary is combined with social observation: not only 'deviant' behaviour, but everyday media appetite reflects the link between sex and violence; in *Super-Cannes* deviance and media may be combined with impunity, exploits relayed ... :

> ... from the terrace steps at the Cardin Foundation, which I had witnessed only a few hours earlier. This time the robbery appeared in close-up, taking place within yards of the cameraman's lens, but there were the same swerving lights, raised truncheons and panic ... (p 237).

Such is the power of the corporations that they can 'police' the deviant behaviour with their own squad and the victims are anyway already marked:

> In many ways we're carrying out tasks the police would do anyway, and we free them for other duties. The sex side can be troubling. A few prostitutes have needed remedial surgery ... There's a remarkable need for punitive violence hidden away in the senior executive mind ... It's surprising how many prostitutes object to rape, even the most stylised kind ... David ... knew that the violence against the local prostitutes was a special kind of rehabilitation, a form of shock treatment that would send them back to their factory jobs ... (p 261).

Now although this is an imaginary domain, the text clearly implicates contemporary society and contemporary mores in its vision. Corporations – Cardin, Shell, Monsanto, Toyota, as well as their creatures, all are identified, along with cultural signposts which mirror the deviant – the Cannes Film Festival, a 'full-scale cultural Nuremberg furnished with film clips of the atrocities they had helped to commit' (p 272). In contemporary life, we 'hear of' businessmen taking in the massage parlours as part of their trip, of corporate embarrassment at less than salubrious involvements, but in the collective frenzy that is our present, the majority remains largely unaffected, our guilt by implication fleetingly acknowledged.

The text acknowledges the role played by gender relations in the maintenance of equilibria between sex, violence and libido. From the overtly bizarre:

> Sexual assaults provided a unique frisson, and older prostitutes received special treatment, for reasons locked deep in childhood pathology ... (p 280),

to the domesticated oddities of the suburban bedroom:

> By watching our wives have sex with strangers, we dismantled the mystery of exclusive love, and dispelled the last illusion that each of us was anything but alone ... (p 322),

the relation of men to women has a role to play in assembling individual and corporate identity. Not only is the relation to wives/prostitutes examined; the boundary between attraction to youth and paedophilia is touched upon. 'No one had been concerned about the child whore sitting alone in the ransacked van', the narrator tells us, adding:

> ... for that matter I was still unsure about my own motives, and why I had followed little Natasha from the car park ... (p 169),

only to be reassured later that desire for a 13 year old is a world apart from that for a 12 year old. Throughout the text, the notion of this window onto our less acknowledged

selves is reflected in references to *Through the Looking Glass*, a pertinent text given the possible unconscious inclinations of the author of '*Alice*', the Reverend Dodgson. The film industry is well versed in the unacknowledged and the art of sublimation:

> 'Where Teachers Dare' ... 'Schoolgirl Killers' ... Cahiers du Cinema says the porn movie is the true future of film ... Leaflets and advertisement flyers were stacked on a desk, showing a selection of well-groomed and smiling children barely on the edge of puberty, as if illustrating a seminar on rubella or whooping cough ... (p 284),

and the link to big business apocryphal:

> ... these vast companies with their powerful executives, sitting in their glass atriums like so many minotaurs. Once a year there has to be a sacrifice of six maidens ... Still, who cares if a few teenage whores disappear into the labyrinth ... (p 351).

Inhabiting the cathected world of corporate society creates a strange existence of alienated intimacy, with direct results not simply in terms of moral action but also moral development. Acknowledgement of the psyche as the fundamental unit in building civic life allows a direct link to be made between individual and social being. Yet with the corporate rather than civic institution creating normative moral values, utility is the defining characteristic of individuals and the motivating force for civic design. Psychiatry is the most appropriate tool for understanding the unwieldy civic consequences of the technological mutation that is our new organic society:

> ... today's corporate city is superbly talented, adult and virtually childless ... there are no energies to spare for anger, jealousy, racial prejudice and the more mature reflections that follow. There are none of the social tensions that force us to recognise other people's strengths and weaknesses, our obligations to them or feelings of dependence ... no interplay of any kind, none of the emotional trade-offs that give us our sense of who we are ... there's no need for personal morality. Thousands of people live and work here without making a single decision about right and wrong. The moral order is engineered into their lives along with the speed limits and the security systems ... If the worst comes to the worst, we tell ourselves how guilty we feel, and that excuses everything. The more civilised we are, the fewer moral choices we have to make ... (pp 253–55).

Although the description relates to the corporate elite, it nevertheless approximates to the dehiscence of moral life from contemporary pedestrian society, where extended families and communities are almost obsolete and the maintenance of the consumer quo is more important than politics. Yet a community built simply to maintain its material milieu, with no reference to ethics or to a broader social context, is a community of unformed persons, a community built on sand:

> But part of the mind atrophies. A moral calculus that took thousands of years to develop starts to wither from neglect. Once you dispense with morality the important decisions become a matter of aesthetics ... Societies that dispense with the challenged conscience are more vulnerable than they realize. They have no defences against the psychotic who gets into the system and starts working away like a virus, using the sluggish moral machinery against itself ... the ultimate gated community is a human being with a closed mind. We're breeding a new race of deracinated people, internal exiles without human ties but with enormous power. It's this new class that runs our planet ... (p 256).

Though such comments reflect a range of apprehensions already well explored in political and literary philosophy – by Marx, Camus, Orwell, Kafka, Huxley – this text promotes a more searching analysis of links between the impoverished psyche and the moral life through an impartial examination of individual and corporate drives to power. Whilst social, political and legal theory – even those aspects of theory linking psychological factors to social issues – are policy driven, this literary text permits exploration of unacknowledged factors in the link between private and public, individual and civic life. The morally neutral stance gives access to those particularly ignoble aspects of the human psyche formerly acknowledged only punitively by religion and state architecture. Yet latterly, although social debate has acquired the vocabulary and images attaching to 'deviant' behaviour (with the assistance of medicine and the media), any broad moral implications have been 'hived off' from ethical scrutiny. In addition this medical-media culture cultivates a separation of subjective behaviour from the notion of deviance – normative or participative deviance can be characterised as 'observation' or 'entertainment', its prurient core unacknowledged. Religious or civic values jettisoned for their melding of social engineering with primal prejudice may be a positive development, but the loss of a mechanism (the age old 'moral calculus') for reflexive tension between individual moral agency and the contingent world is not. Ballard's scrutiny of the interplay between 'the deviant' and 'the natural' is itself so discomfiting that it invites dismissal as near-pornography rather than anthropology, but the message is serious. An attenuated morality, such as that shared by us all in a consumer society, is the most debased and debasing of all, implicating all in the wholesale denouncement of values beyond the material, a denouncement gilded with the faux moral life that is 'a matter of aesthetics'. The 'psychoses' working away at society like a virus inhabit us all to greater or lesser degrees, although many will find what may well seem socially constructive outlets for the libidinous drive. Even the philanthropist is implicated however: in the text Dr Greenwood works tirelessly to help young girls but ultimately becomes embroiled in the corrupt practices surrounding them. There are echoes of Greene – the plea in mitigation on behalf of universal human frailty, the dubious roots of altruism. The message of the text is complex – that we are *all* capable of evil *and* that we are in danger of becoming blind to the manifestation of evil. 'All are psychotic but some more psychotic than others' might summarise Ballard's position, no doubt gleaned as much from empirical study of corporate diversions as from the concentration camps of his youth. The psychotic within who is mishandled and mis-recognised as harmless – the Hitler refused artistic recognition who goes on to found his own source of aggrandisement – ('the introverted and mousy accountant … had turned into a confident and well adjusted sociopath' (p 318)) may be a virus in the machinery. But it takes a fatally weakened moral structure to succumb to the virus, a psychosis shared between 'participant' and 'compliant' moral agents.

As already mentioned, gender relations play a part in the moral dynamics of the civic experiment in the text, the controlled psychosis, metamorphosed as therapy, both feeding upon – and feeding – gender relations. Adolescent girls, wives, prostitutes – all are defined by their position in the sexual 'register' of the masculine mind and as such the masculine mind is itself defined. When the narrative reflects:

> By watching our wives have sex with strangers, we dismantled the mystery of exclusive love, and dispelled the last illusion that each of us was anything but alone … (p 322)

it is not prurience, as we might expect, but loss and regret that dominates the experience: the dismantling of a mystery may provide momentary excitement but loss of the last, fundamentally persistent creed when all others have been lost – of unity through another – creates existential panic. Though it is predominantly men in the text who perpetrate and cultivate the dark world of violence and the narrator struggles with his own ambivalent relation to such stimuli – frankly and clinically acknowledging such elements even in the most balanced and conscientious self – it is *woman* who bears not only the stigmata, but the stigma of emptiness that ensues. Observing that 'a strange crevice appeared in the area of her mouth, a vent of hell (p 285)' almost exactly mirrors the ghastly void and loss of mystery when Tess confesses her past in *Tess of the d'Urbervilles* over one hundred years earlier: '... her mouth took on the aspect of a little round hole.' However little formal credence is paid to the psychological, the psychoanalytic explanations of human behaviour, there is clearly a fundamental persistence in the construction of identity for both sexes through the apprehension of one to the other. The text gives very little analogous indication of how female perception and moral agency is constructed – even when women play an active role either as corporate players or as prostitutes, for them essence appears to precede existence in some indefinable way. 'In the case of women the system of imposed psychopathy is already in place – It's called men' says Penrose the psychiatrist, falling back upon a perception of women which certainly seems made out by statistics and stereotypes, but does little to critique them. Thus *Super-Cannes* provides a serious and explicit reflection upon the moral decay underlying modern society, of corruption, of the consumption of human beings by others, of the consumption of humanity as units of utility in the pursuit of profit. But for all the frank exposition, the last bastion unstormed seems to remain that of man's troubled identity with woman. Though recognising that woman embodies the 'last illusion' that man is not alone, the text does not explore the implications of this illusion, or of the loss of this particular illusion, for the moral life. For if the corporate provides a new social experiment which allows us to re-examine the shadows at the heart of 'normality' – indeed if every generation provides a new experiment in learning what it means to be human, this one element appears to be intransigent, not just in material terms, of equality, of exploitative gender relations – but more fundamentally in spiritual terms. *Each* person is defined in part by his relation to others and the route of the relation varies from time to time and culture to culture. Yet even in this explicit, morally questioning and conscientious text, where in true fin de siecle style, 'the debris of a dream washed ashore among the driftwood (p 392)' the narrator whose disinterested observation has guided us through the apocalyptic vision of ourselves collapses into the romantic hero.[4] For all his realisation that woman cannot and should not be the keeper of man's integrity, he rescues his feisty doctor wife from her immersion in depravity, now looking:

> ... younger than the teenage physician I had first met at Guy's, an exhausted Alice who had lost her way in the mirror world ... (p 386).

4 This may reflect Ballard's lucid experience of women as a reservoir of kindness (see Ballard (1994)) and not romanticism as an abstraction alone.

THE VIEW FROM *SUPER-CANNES*: PORNOGRAPHY, CHILD PROSTITUTES AND CORPORATE LIFE

The vision of society created in *Super-Cannes* may seem bleak, but it reflects some clearly denied aspects of present-day culture. The belief that any link between pornography, sexuality and violence reflects a minority aberrance of poor empirical standing is still widely held. Yet since, for example, 'in the US, pornography is a major industry – bigger, for example than the film and record industries combined'[5] its influence, not just upon behaviours, but values and beliefs must be much greater, in subtle *and* non-subtle ways, than society admits. That pornography is an issue of political, cultural and legal importance is most cogently expored – and exposed – in Drucilla Cornell's *The Imaginary Domain* (Cornell (1995)), a text central to feminist and civic politics. Cornell demonstrates appropriate points of integration and separation for any survey of pornography across these linked social domains. Where she adopts a feminist perspective, which is both psychoanalytic and political, Ballard charts a more observationally neutral view of the absurdities and cruelties which comprise human behaviour, locating him in an interesting contrast to Cornell, closer to Socratic enquiry than activist politics. Both are worthy perspectives upon the debate. When pornography was investigated over twenty years ago by the Williams Committee on Obscenity and Pornography (Williams Committee (1979))[6] the committee concluded that, with regard to the effects of pornography and violence on human behaviour, 'research tends, over and over again, to be inconclusive'.[7] Revisiting these issues again, it seems that the conclusion would have to be different, yet empirical study into the darkness of the human psyche is hampered by the intersection between behavioural factors, social conditions and the psychological milieu, so that findings tend to be constructed in a climate of caution. With regard to violence, for example, although:

> The most recent British research into the linkage between violent videos and violent behaviour (albeit non-sexual), conducted on behalf of the Home Office, also proved inconclusive [and] … the research concluded that offenders brought up in a violent family background are most likely to … identify with violent figures … that did not lead to crime. However, once the taste for violent videos was established, it was more likely that that diet would 'nurture increasingly anti-social behaviour …[8]

Yet recent empirical observations of studies of 'normal' law-abiding citizens and of sex offenders corroborate a clear link between pornography and violence: James Weaver (1992) reviews the research on 'normal' subjects, which has been extensive in the United States, whilst Ray Wyre ((1992), pp 236–47) concentrates upon observed links in proven offenders. Both unequivocally conclude that linkage between sex and violence is clear; simply, that pornography which depicts violence towards women breeds a culture of violence linking to sex. In addition, feminist critiques, most notably those of Catherine MacKinnon and Andrea Dworkin,[9] draw attention to the selectivity of criteria counting as

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5 'Pornography', in Crystal (2000), p 877.

6 *Report of the Committee on Obscenity and Film Censorship*, Cmnd 7772, 1979, London: HMSO.

7 Ballard (1994), para 1.10.

8 Barnett (1998), p 289, fn 47.

9 For a summary of current arguments raised by Catharine MacKinnon and Andrea Dworkin, see Barnett (1998), especially p 291 *et seq*.

'harm' in the pornography debate.[10] This selectivity contributes to the finding 'not proven' and utterly denies the legitimacy of the plea that there are much bigger, 'ideological' moral claims at stake – most significantly the insidious harm to women, girls, and thus to men and boys of a climate of human indignity, specifically female degradation. The field is a troubling one. Having just emerged into a world of 'freedoms' which impinge upon women and men, how may we theorise a community which minimises such harms without a draconian reduction in freedoms – how imagine a new city state which lays claim to a 'right' for women – and men – to live, for example, free from the harms pornography might pose, without collapsing into repression?[11] Indeed, JM Coetzee, author of the next text explored in this chapter, argues that any 'harms' of pornography are part of a much broader culture of harm; that whilst:

> Pornography is simply not as potent or as omnipresent a force in the wider world as it is – or as MacKinnon feels it to be – in the United States … There are a multitude of societies in which rape has long been a practice without pornography ever having been the theory (Coetzee (1996), p 81),

nevertheless:

> What is disturbing about the films that disturb MacKinnon, in this wider context, is what is disturbing about modern commerce in general: that, blank as it has ever been about the moral consequences of the goods it handles, it penetrates markets with unexampled speed and, where it fails to find an immediate appetite for its goods, has no trouble in creating one (Coetzee (1996), p 82).

Though she might object to the implicit displacement of the pornography debate such commentary creates, neither MacKinnon, nor other feminist theorists would argue with the concepts of 'creating appetites', of broader contexts of harm than that indicated by discussion of pornography in isolation. Yet if the creation of appetites by consumerism means that some*one* will be consumed, there is a need to consider again the instability

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10 For a thoughtful overview of the debate, see Jackson (1995). With regard to the role of law, Jackson's comment ((1995), p 69) pays proper recognition to the deep cultural challenge required:

> … the time has come to admit that the law cannot reverse a cultural obsession with sex by addressing one extreme means through which this obsession is expressed. Pornography will, I believe, continue to exist while the sexual status quo persists, but this should not lock us into inertia. Gender inequality and the desire for titillation are integral to current patterns of social interaction. This reality must be renegotiable and open debate about pornography is a valuable channel for the reassessment of our cultural values. Redefining the legitimate and helping to construct the socially unacceptable are valuable roles for the law, and perhaps anti-pornography ordinances contain an important normative judgment about the acceptability of female exploitation … It is, nonetheless, crucial that we should not pin all our hopes on the legal regulation of pornography as a panacea.

11 Barnett ((1998), p 315):

> It may be that the limits of law in terms of effecting changed social mores are reached when the law condemns and restricts the production and availability of pornography through regulation: social not legal change is, from this perspective, a prerequisite for changing the meaning and effects of pornography. However, if 'the problem of pornography' is not conceptualised as an issue of woman's status, woman's equality, but regarded as an aspect of the expression and representation of human sexuality, in all its many manifestations, the argument for any form of regulation – other than for the protection of children or sex workers against unlawful violence – falls away. On either interpretation, pornography represents intractable difficulties for feminism. Too great a focus on pornography, and too great an emphasis on law as the solution to the problem howsoever defined, not only invites failure, but also reinforces the notion of women as victim, women as unequal.

that such an appetite-driven 'human nature' might imply. There are two issues here. Insofar as pornography is an 'omnipresent force' in the Western world, the possible harms it creates are, as Coetzee indicates, pervasive. That rape is a perennial form of assault with or *without* the possible influence of pornography is also true. Yet the implication that the sexual consumption of others through the use of words and images may of itself produce a culture of sexuality as assault seems strong.[12]

Super-Cannes explores the ignoble and appetite-driven aspects of human nature, postulating a view of humanity based largely upon anthropology and psychiatry rather than the aspirations of classical philosophy and theology.

REASONABLE MAN OR 'THIRD CHIMPANZEE'?

Super-Cannes postulates several characteristics in its model of human nature, characteristics which are reflected, though not always fully acknowledged, in social practice. The working man harnesses libidinous drives in pursuing a successful life, drives which intersect between creativity, aggression, sexuality; the intersection at any one time foregrounding one or more aspects with others remaining latent and changing according to the social context. The drives can be identified on individual, group and community levels. On an individual level, certain personalities clearly gravitate towards 'deviant' characteristics and behaviour. Some neutrality of stance is achieved in the depiction of the psychiatrist himself as 'deviant', not merely in his personal pursuit of degrading or violent practices, but his professional investment of libido – of creativity, aggression, sexuality – in his experiment in social engineering. Here the ego-driven professional, whether doctor, politician, scientist, judge, philosopher – may invest libidinous drive in the pursuit of power: such characters are known in history and in working life; nor are women necessarily excluded. A second type is poignantly reflected in Dr Greenwood, the paediatrician who begins with pure and altruistic intentions but himself becomes drawn to the exploitative aspects of his work; the 'looking glass' reflecting back now the face of corruption rather than virtue. Greenwood represents an important aspect of moral agency in that he points up the possibility that moral character is not fixed and that the poles of 'good' and 'evil' are not necessarily a helpful adjunct in envisioning negotiation of the moral world. Simply, he raises the possibility that 'goodness' and virtue may be unstable characteristics and more reliant upon the convergence of supporting factors than hitherto understood. Thirdly, we have the ingenue narrator, confessing his confusion of responses, as he stumbles between the desire to protect and the desire to predate, between disgust and unwonted arousal, physiological and psychological. Nor is the book dealing with sexual exploitation *simpliciter*, but with the diffuse interface between sexuality and violence and between the

12 Colombo ((1994), p 31):

> … considerable methodological problems remain, such as the degree to which laboratory results reflect reality, and the weighty question of causality. Edward Donnerstein … notes that 'some research indicates that a rapist's level of violent and sadistic behavior can be determined by his degree of sexual arousal upon viewing sexually violent images'. In addition, the latest scientific research seems to indicate that violent pornographic material arouses not only convicted rapists but 'normal' males as well. This, of course, is not the same as claiming that pornography 'causes' rape, a distinction that the [Mackinnon-Dworkin] ordinance tended to blur …

'consumption' of adult and child flesh. Together, the characters suggest not a stable majority 'reasonableness', but uneasy movement between several loci embracing the realm of moral possibility. Once characters become involved in 'group' activities and identity this again affects the adoption of persona and position on the spectrum of moral agency. Finally, anyone not already implicated by the 'individual' and 'group' disruption of moral life, cannot avoid the moral implication of individuals in the creation of community life, for the snapshot view of contemporary values that is *Super-Cannes* reminds us that corruption is dependent upon a network of wider social practices, intimately tied into consumerism, that we are all implicated, all accessories to the fact.

Such fragmented and fluid moral responses are reflected across many pursuits, reference in particular to profiles of 'sex exploiters' compiled by the World Congress Against Commercial Sexual Exploitation of Children[13] ties in with this profile of broad spectrum exploitative practice in terms of consumer and 'consumed'. The 'Executive Summary' reports that:

> Although some children are prostituted by and/or specifically for paedophiles and preferential abusers, the majority of the several million men who annually exploit prostitutes under 18 years of age are first and foremost *prostitute users* who become child sexual abusers through their prostitute use, rather than the other way about. Child sex exploiters (situational, preferential and paedophile) are thus drawn primarily from the following groups: local prostitute users; the military; seamen and truckers; migrant workers; travelling businessmen; tourists, expatriates; aid workers; and employers of domestic workers ... (p 1).

Definitions of 'sex exploiters' reflect the blurred boundaries drawing together conventional views of 'normal' and 'deviant' behaviour; indeed the word 'deviant' becomes entirely misleading as the description of individuals attracted to such pursuits encompasses not only the egomaniac Penrose, but the plausible, kindly Greenwood as well as the narrator of unstable and transient appetites. Whilst the term 'paedophile' is:

> ... a clinical one, used to refer to an adult who has a personality disorder which involves a specific and focused sexual interest in pre-pubertal children ...,

the paper also identifies the 'preferential child sex abuser' – those individuals whose:

> ... preferred sexual objects are children who have reached or passed puberty. Such abusers are usually, but not always men, and their victims may be either male or female children.[14]

Finally, there is the 'Situational Child Sex Abuser', a term:

> ... used to refer to adult men and women who sexually exploit children not because they have a focused sexual interest in children *per se*, but *either* because they are morally and/or

13 See www.usis.usemb.se/children/csec/2166.htm (1996).

14 The paper expands:

> Again, psychiatry views their taste for immature and powerless sexual partners as the manifestation of a personality disorder (hebephilia) ... [with] three major behaviour patterns ... there is 'the seduction pattern' ... typically followed by offenders who are motivated by a form of narcissism, seeing some lost part of themselves in the 'innocent' child, and/or having a strong sense of emotional congruence with the children they abuse ... (p 2).

In *Super-Cannes*, the motif of *Alice Through the Looking Glass*, of adults 'stepping back' through a 'mirror', nicely encapsulates this oddity.

sexually indiscriminate and wish to 'experiment' with child sexual partners, or because they have entered into situations in which a)children who match their ideals of physical attraction are sexually accessible to them, and b) certain disinhibiting factors are present which allow them to either delude themselves about the child's true age or about the nature of the child's consent ... *It is also worth noting here that many models used in the production of pornography aimed at 'normal', and not paedophile, men are actually under the age of 18, and an adult who is sexually aroused by the sight of someone who is legally and chronologically a child ... cannot necessarily be understood as sexually or psychologically 'aberrant'* ...[15] (p 2).

Overall the paper indicates a vast industry and a broad spectrum of 'abusers' – and this with particular reference to the 'child sex' industry. Ballard's depiction of 'reasonable' and 'reasoning' men, of a spectrum of clientele with extremely 'respectable' public identities, of individual and 'group' identities, is well supported by the empirical study, undermining the all too simplistic divide between 'normal' and 'aberrant', between 'deviant' and 'healthy' sexual interests. It is to some extent due to a limited acknowledgement of this fact, in the expansion of the 'reasonable man' in criminal law doctrine so as to accommodate an ever widening spectrum of aberrant behaviour patterns, that their Lordships in *R v Smith* (2000) found some difficulty in maintaining the reasonable man as a credible or rational vision.[16] Ray Wyre's review of his work with sex offenders, *Pornography and Sexual Violence*, resonates disturbingly with the picture created by Ballard. Wyre identifies 14 factors as preconditions for abuse, and emphasises that although:

> I'm talking here about sex offenders. Many men see pornography and don't necessarily go out and abuse: though we are now discovering that the level of rape, sexual assault and child sexual abuse is much higher than we ever knew it to be ...

nevertheless:

> But the men who offend are 'ordinary' men from every walk of life. What pornography does is create a climate of thought and belief which influences attitudes towards women and children which is endemic in our society. So, although the vast majority of men will say, 'Well I don't go out and abuse because I watch pornography', what they're missing is that they're still taking on the myths those stories are portraying. That's the danger of it. It maintains that climate of misogyny. I believe that pornography influences the attitudes of all men regardless of the behaviour that takes place as a result ... (Wyre (1992), p 241).

Most tellingly, Wyre warns:

> There is a tendency to want to divide the male world into those men who are deviant and those who are normal, to suggest that deviant men would have raped whether they were influenced by pornography or not. But my experience is that this is not the case. I work with every type of man ... The 'deviancy' model ... is not accurate in my view ... Women experience abuse of many kinds and at different levels from all men. We have a continuum,

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15 Emphasis added. The report is at pains to point out the widespread and 'normal' distribution of clientele:

> These millions of clients are a very disparate group in terms of their nationalities and their socio-economic, cultural and religious backgrounds. To explain the behaviour of such a large and varied group solely through reference to two clinically defined personality disorders – paedophilia and hebephilia – (diagnostic categories which are themselves based on research with a relatively small and atypical sample of Western men) would clearly be unsatisfactory ... Prostitute use is sometimes a group activity, experienced as pleasurable because it consolidates a shared masculine identity and heightens a sense of group belonging ... (pp 5–6).

16 Though the case is concerned with homicide and not a sexual offence, the uncertainty of the doctrinal model is an underpinning problem in criminal law.

> and we have decided arbitrarily to draw a line that says certain bits of behaviour are illegal, and that other bits of abusive behaviour are not ... I believe all men are on a continuum of sexism in the same way all white people are on a continuum of racism. Implicit in this view is the potential for change – and this is very important ... (Wyre (1992), pp 242–43).

Thus Ballard's indication that 'normal' man has 'deviant' impulses and 'a taste for cruelty' – factors inexplicable to classical philosophy and understood, though only poorly, by psychiatry – begins to inform the incomplete view of human nature available to law. His utilisation of anthropological models, of '*homo sapiens* ... a reformed hunter-killer of depraved appetites' invites an additional disciplinary contribution. Indeed, his 'model' of modern man is again substantiated by modern anthropology. In the patchwork construction and revision of the reasonable man in law there has been little reference to man as primate, but the behaviour patterns of affections and disaffections, of consumerism and aberrance, concur most impressively with studies viewing man anthropologically and as an elaboration of primate evolution, a creature for whom the 'drives' of sexual, group, and other power rivalries, of 'Pavlovian' reinforcements of behaviour patterns via physical and emotional deprivations or rewards. Indeed the evidence is accumulating rapidly in our present culture of more open disinterested debate. In his anthropological study *The Third Chimpanzee*, Jared Diamond surveys theories concerning concealed ovulation and copulation, noting the strongly persuasive theory of female sociobiologist Sarah Hrdy:

> Hrdy was impressed by the frequency with which many primates – including not only monkeys but also baboons, gorillas, and common chimps – kill infants not their own. The bereaved mother is thereby induced to come into estrus again and often mates with the murderer, thus increasing his output of progeny ... Such violence has been common in human history: male conquerors kill the vanquished men and children but spare the women ... (Diamond (1993), p 81).

Such 'mating' is characterised by female submission – considering the 'group' behaviour of a band of chimpanzees, Jane Goodall observed:

> The next month, three Kasakela males and one female again travelled south and attacked the Kahama male De, who was already weak from a previous attack or illness. The attackers pulled De out of a tree, stamped on him, bit and hit him, and tore off pieces of his skin. A Kahama estrus female with De was forced to return northward with the attackers ... While the above attacks were aimed at Kahama males, in September 1975 the Kahama female Madam Bee was fatally injured after at least four non-fatal attacks over the course of the preceding year. The attack was carried out by four Kasakela adult males, while one adolescent male and four Kasakela females (including Madam Bee's kidnapped daughter) watched ... (Diamond (1993), p 292).

This 'group' behaviour, and the resultant 'placing' of individuals *within* groups and *between* genders is reflected in court referrals and newspaper accounts of 'street' violence throughout the world every day. Subliminally, such 'group' and 'hierarchical' identities are also at work, though without such overt violence, in more pedestrian circumstances – in the workplace, with its subtle power games male-to-male, male-to-female, female-to-female, manager-to-subordinate: so close to workplace 'harassment', to sexual or racial discrimination. Ballard's contribution is in bringing to realisation the 'inner' psychical realm through which such identity operates and its link to libido and to community

'normality'. Wyre's vision of a 'continuum' implicating us all, is given further substance in Ballard's depiction of broad civic structures, the social and moral webs through which behaviour is rationalised and sublimated. His 'naming' of corporations is only part of a broader examination of the network of linkages in the production of 'public' and 'private' perceptions and identities, where, to borrow Coetzee's term, 'appetites' are 'shaped'. The film industry, with its banal diet of sex and violence brought into our everyday lives as a pure import of consumerism is only one part of the broader culture; magazines too ceaselessly and unquestioningly focus upon such appetites – sexual, prurient, narcissistic. In particular, Ballard challenges the blurring of taboos combining pornography and children, fact and fiction.[17] Maintaining neutrality, he emphasises not the 'deviant' few but the unknown core of individual and collective human 'nature' evident in present everyday culture, where not only pornography and violence are normalised but images of children, even in apparently 'innocent' settings, are 'sexualised' – from advertisements to the design of children's clothing. Most courageously, he attempts to question and 'model' that unknown core at the level of individual psyche – the kindly, 'reasonable' man who, whilst not acting upon it, finds himself 'inadvertently' aroused by violence, by the juxtaposition of sex and violence, by the juxtaposition of sex and children.

If, as the quotation at the beginning of this chapter suggests, social contract theory, 'the notion of the community as a voluntary association of enlightened citizens', is now subject to a new 'inter-discipline' of psychiatry and anthropology, of a view of *homo sapiens* 'as a reformed hunter-killer of depraved appetites', hard reassessments are due in our understanding of human nature.[18] Such appraisal is all the harder when solitude and mortality engulf the loss of traditional structures, whether they be religious or secular – God in Man or Man as natural citizen. Deferring the force of that appraisal, losing ourselves in the 'exhausted Alice who had lost her way in the mirror world' simply extends, for both sexes, the period of 'parole in the polite suburbs of the city state'. The city is empty; the citadel that is human capacities can only be breached when our journey from hunter-killer to partial rehabilitation to polite parole is properly understood as perennially linked to the deferral of selfhood that occurs when we infantilise or objectify another as a unit of self-gratification. *Super-Cannes* is a moral parable, its ultimate lesson unencumbered self-knowledge. *Disgrace* contributes to the getting of this knowledge not in the context of a vast and cynical *corporate* illusion, where 'the crime wave is consumer capitalism' (*Super-Cannes*, p 362) but that of individual illusion, the illusion created by the equally seductive aesthetic culture of selfhood.

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17 For a brief discussion of recent developments in law with regard to links between film, pornography and paedophilia, and especially the attempt to link human rights under the ECHR with child rights, see Edwards (2001).

18 Gelman ((2001), p 50):

> As a writer who has lived in the USSR throughout my life, I struggled as hard as I could against the dead hand of political censorship. But there is another kind of censorship. It is biological censorship: the organism itself – muscles, brain, neurons, even the blood – prevents one from discovering the whole truth about oneself. One has to be very careful not to fight against this censorship. Maybe that is why I am wary of trying to come to a final understanding of what happened to me in the ghetto. I fear the lifting of biological censorship, because it hides the unbearable, the killer in us.

DISGRACE

Disgrace may be summarised briefly in terms of plot – an ageing academic, David Lurie, abandons his post under a cloud, after allegations of sexual harassment. He travels to the country to stay with his daughter, Lucy, there is a burglary during which Lurie is assaulted and Lucy raped, leaving Lucy pregnant with the child of the assault.

Such brief summary would, however, be a travesty upon the powerful politics of the book, primarily its *linkage* between the rationality of the white liberal scholar Lurie and that of the rape. The 'history' that has produced the values of enlightened scholarship, of worship of 'the ideal', is the self-same history that has disenfranchised and brutalised a people, the rape reclamation of a debt, a primal inevitability when the structures of the dominant force begin to crumble.

The enlightened scholar

How has such duality – a brutalising enlightenment – come about? The text is clear: enlightened liberalism by its nature makes its agent a simultaneous 'carrier' of tainted ethics. By now a tired old conclusion (we can trace it to a multitude of commentators, to Marx and beyond) the *force* of ethics is given new clarity in this narrative model; of how such incongruity can inhabit one frame.

Lurie, a scholar of English literature in South Africa, is divorced and ageing. His routine – teaching, researching, is supplemented by weekly visits to a young black woman, Soraya:

> He has been on her books for over a year; he finds her entirely satisfactory. In the desert of the week Thursday has become an oasis of *luxe et volupte* … (p 1).

Almost at once, there are fragments in the text which alert us: Lurie is archetype, and the archetype carries not so much 'duality' (for this sounds perilously close to something more willed, almost 'duplicity') as complex elisions. In his relation to Soraya, in his relationships generally, Lurie sees himself not as predator (for is she not 'autonomous', 'in business'?) but on the contrary, alive to the needs of others as well as his own. He is a person who has learnt 'humility', appreciates 'irony', yet the text betrays how very easily the possession of such powers may facilitate more subtle elisions:

> He continues to teach because it provides him with a livelihood; also because it teaches him humility, brings it home to him who he is in the world. The irony does not escape him: that the one who comes to teach learns the keenest of lessons, while those who come to learn learn nothing. It is a feature of his profession on which he does not remark to Soraya. He doubts there is an irony to match it in hers … (p 5),

thus the 'enlightened scholar', willing to learn humility and lessons, cannot see that there must be at least as much irony for the prostitute: just one instance of reader-produced reflexivity in the text. As scholar (and 'scholar' may serve as a useful sign for other 'legitimators') Lurie fosters a daily intimacy with the evaluation of ideas, with exploration of meaning – 'Yet', he tells his students:

> ... we cannot live our daily lives in a realm of pure ideas, cocooned from sense-experience. The question is not, How can we keep the imagination pure, protected from the onslaughts of reality? The question has to be, can we find a way for the two to coexist? (p 22),

yet *this* coexists with exploitations and evasions of meaning in the realm of his desires. First, his glimpse of Soraya with her two little boys encroaches upon the illusions – illusions clearly unaffordable to Soraya – in his sexual contract. Then he embarks upon a relationship with a young student, Melanie, using 'smooth words, old as seduction itself', he tells Melanie that she should succumb to his desires:

> Because a woman's beauty does not belong to her alone ... she has a duty to share it ... you should share it more widely ... (p 16).

Though conscience stings, desire prevails so that 'their' sexual encounter is an event where:

> Nothing will stop him ... Not rape, not quite that, but undesired nevertheless, undesired to the core. As though she had decided to go slack, die within herself for the duration, like a rabbit when the jaws of the fox close on its neck. So that everything done to her might be done, as it were, far away ... (p 25).

Yet in this relationship, Lurie has crossed the public/private divide. Charged within university procedure with 'harassment' of a student, he is advised by a lawyer to 'minimise the damage' and 'as a matter of strategy, get a woman to represent you' (p 42). Still not open to bearing responsibility for a 'wrong', Lurie admits to himself a contrast approximating to Melanie and Soraya, an ugliness of stance which must reflect the essence of any prostitution pact:

> Yet perhaps she has a point. Perhaps it is the right of the young to be protected from the sight of their elders in the throes of passion. That is what whores are for, after all: to put up with the ecstasies of the unlovely ... (p 43).

Lurie's honesty with himself, the examination of his own conscience in this way demonstrates his willingness to submit to brutal self-portrayal, courageous disinterest. Yet seeing himself baldly *subject* to scrutiny as 'unlovely' even in ecstasy – a moment of spiritual nakedness – he still generates the age-old prejudice: the commodification of self is blind to the commodification of others.

Subject to official investigation, however, Lurie's adoption of the voice of educated disinterest rings hollow and is challenged by a female colleague:

> Suffice it to say that Eros entered ...
>
> Is this a defence you are offering us? Ungovernable impulse?' ... *Abuse*; he was waiting for the word. Spoken in a voice quivering with righteousness. What does she see, when she looks at him, that keeps her at such a pitch of anger ... a great thick-boned male bearing down on a girl-child ... how absurd! Then he remembers: they were gathered here yesterday in this same room, and she was before them, Melanie, who barely comes to his shoulder. Unequal: how can he deny that (p 52)?

Where an accused person may admit that he is 'wrong' but not 'guilty', Lurie attempts to maintain mastery of the investigation, bow to the formality but not the spirit, in being willing to concede that he is 'guilty', but not 'wrong'. In so doing, Lurie is asserting the authenticity of his canonically derived inner narrative – of Byronic desire, of himself as

misunderstood scholar – over the canons of an 'alien' morality. The lack of *integration* fostered by the public/private divide is concentrated in the gulf between words and exemplified in the law, a law without claim upon personal morality. 'You trust yourself … to divine whether it comes from my heart' but says Lurie:

> I have said the words for you, now you want more, you want me to demonstrate their sincerity. That is preposterous. That is beyond the scope of the law … I appeared before an officially constituted tribunal, before a branch of the law. Before that secular tribunal I pleaded guilty, a secular plea. That plea should suffice. Repentance is neither here nor there. Repentance belongs to another world, to another universe of discourse … (pp 55–56).

Truly Machiavellian, not only does Lurie quibble about the relevance of repentance, his impervious value system ascribes the basest of motives to the tribunal:

> *Counselling* … these are puritanical times. Private life is public business. Prurience is respectable, prurience and sentiment … (p 66).

Thus, despite the shockwave of the harassment claim and subsequent resignation, Lurie sustains his sense of self: the complex and sophisticated intellectual is not easily breached by ordinary shame. He removes to the country, where he continues to inhabit this all too feasible lofty-humble persona, judging women who 'make no effort to be attractive' (p 72) and of his departure from the city explains:

> Is that what you think I have done … Run away from the scene of the crime? … You miss the point my dear. The case you want me to make is a case that can no longer be made, basta. Not in our day. If I tried to make it I would not be heard … My case rests on the rights of desire (p 89) … Scapegoating worked in practice while it still had religious power behind it. You loaded the sins of the city on to the goat's back and drove it out, and the city was cleansed. It worked because everyone knew how to read the ritual, including the gods … Then the gods died, and all of a sudden you had to cleanse the city without divine help. Real actions were demanded instead of symbolism … Purgation was replaced by the purge (p 91).

This all too sustainable credibility suffers a fresh assault, however, when Lurie's daughter is raped. Asking Lucy's black neighbour 'Am I wrong to want justice?'.

Lurie thinks:

> *… if it had been your wife instead of my daughter … you would not be tapping your pipe and weighing your words so judiciously. Violation*: that is the word he would like to force out of Petrus … (p 119).

In the context of Lurie's history, this railing against judicious weighing of words and call for the more potent word, is of course deeply ironic. The melding of themes in the text point to more than 'the biter bit' however; they plead recognition that Lurie as archetype – scholar, thinker, aesthete, idealist – is also blind, unthinking, crude – that for all his depth, he is superficial. Yet it is crucial to appreciate that the message is not a simple denunciation, an unmasking of an impostor. With access to Lurie's mind we can see how *sustainable* this vision of the self has been, that even to a man who feels he is open to learning, humble, alive to nuance, the vision is a *plausible* paralogism.

Whether we like it or not, this plausible paralogism underlies the Western mindset and three issues in particular are identified in its formation. First, the romantic tradition, which has sustained man and woman in a seductive web of insincerity, an *inauthentic*

relationship to the other and the self. Secondly, linguistic development itself, bifurcating from more effective communicative outcomes. And thirdly, from the foregoing two, a failure to recognise the ugly realities linking us all, death; the relationship between sex and violence; the threat of purposelessness.

Clearly the sex and violence linkage is a theme touched upon in Lurie's denial of his own baser self and this denial might be challenged by the juxtaposition of the rape. One aspect of the discourse is that rape is fundamental political currency: the rape of Lucy, though done 'with personal hatred' can be characterised as 'history speaking through' (p 156) the rapists. Yet Lucy insists that Lurie reflect upon its relation, not just to the darker history of Western politics, but to masculine sexuality and indeed the political history and the sexuality at times bear an inextricable relation to one another. The 'mailed ancestors' of *Tess of the d'Urbervilles* rollicking home from the fray who dealt 'ruthlessly' with female peasants are reflected in *Disgrace* – 'rapists cum taxgatherers' (p 199). But, reasons Lurie to himself:

> Lucy was wrong. They were not raping, they were mating. It was not the pleasure principle that ran the show but the testicles, sacs bulging with seed aching to perfect itself. And now, lo and behold, *the child*! … What kind of child can seed like that give life to, seed driven into the woman not in love but in hatred, mixed chaotically, meant to soil her, to mark her, like a dog's urine … (p 199).

Lurie's equivocation between 'raping' and 'mating', between biologically determined physical impulse and contempt-driven psychical impulse, reflects a broader social ambivalence to the unilaterally desired act.[19] In so equivocating, Lurie subconsciously relates his own libidinous past to that of the rapists and the jury of his mind gives partial exculpation: instinct, biologically determined and self-propelled, 'aching to perfect itself' and so near unavoidable. Again, the hitherto unsayable is said, and we are better for it. Though the image of 'rollicking mailed ancestors' *approaches* the issue, it is essentially evasive of brute realities and inextricably tied in to the romantic tradition. Lurie begins to realize this:

> He remembers, as a child, poring over the word rape in newspaper reports, trying to puzzle out what exactly it meant … wondering what the letter p, usually so gentle, was doing in the middle of a word held in such horror that no one would utter it aloud. In an art-book in the library there was a painting called *The Rape of the Sabine Women*: men on horseback in skimpy Roman armour, women in gauze veils flinging their arms in the air and wailing. What had all this attitudinising to do with what he suspected rape to be: the man lying on top of the woman and pushing himself into her … (p 160).

Yet having pursued this recollection, made the connection, he is still resistant to the full implication of himself as archetype:

> He thinks of Byron. Among the legions of countesses and kitchenmaids Byron pushed himself into there were no doubt those who called it rape. But none surely had cause to fear that the session would end with her throat being slit.

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19 In *R v A* [2001] 3 All ER 1, the House of Lords ruled that rape victims can be questioned in court about their previous sexual history with their alleged attacker. In the words of the Court of Appeal the 'equality' model so reflected – of 'consensual' sex 'whether male or female' was 'not based on a sexist attitude towards women but 'simply *reflected human nature*' (italics added) – reported (2001) *The Times*, 18 May.

For Lucy, though, her father was geographically present at the rape, 'disgraced' in his own eyes, he is *ideologically* removed from the meaning of rape, a meaning which she tries to grasp for herself. She will not report the rape to the police. This would be practically fruitless, since she does not wish the rape to define her identity and reporting would force a retreat to the suburbs, but also there is an indication that it would perpetuate a collusion with the very system which has brought the rape to pass, defining her present:

> I am not the person you know. I am a dead person and I do not know yet what will bring me back to life. All I know is that I cannot go away … (p 160).

In deciding to continue the pregnancy Lucy reasons:

> Objectively I am a woman alone. I have no brothers. I have a father, but he is far away and anyhow powerless in the terms that matter here … Petrus may not be a big man but he is big enough for someone small like me … then the child becomes his too … I agree it is humiliating. But perhaps that is a good point to start from again. Perhaps that is what I must learn to accept. To start at ground level. With nothing … no cards, no weapons, no property, no rights, no dignity … (p 204).

The body of the woman, her generative mediation, is primal political currency; recognition of this fact leaves little room for 'dignity', but that dignity has anyway derived from a tyranny.

Linguistic elision has supported the edifice, from the hitherto unspoken politics of the body, to sham virtues. The virtuoso linguist is not exempt from the charge and may have promoted it – Lurie teaches advanced communication skills, the course descriptor: 'Human society has created language in order that we may communicate our thoughts, feelings and intentions to each other' he finds 'preposterous', preferring the vision of language as a development from song. But it is when he is forced to seek material 'truths' that the obsolescence of language is starkly evident and it is an obsolescence derived not solely from its imposition by colonialism:[20]

> … stretches of English code, whole sentences long have thickened, lost their articulations, their articulateness, their articulatedness. Like a dinosaur expiring and settling in the mud, the language has stiffened. Pressed into the mould of English, Petrus's story would come out arthritic, bygone … (p116) the language he draws on with such aplomb is, if he only knew it, tired, friable, eaten from the inside as if by termites … By the time the big words come back reconstructed, purified, fit to be trusted once more, he will be long dead … (p 129).

Disgrace encapsulates the corrosive influence of the romantic tradition through the 'Byron' motif. Lurie identifies with Byron and plans to write a Byron libretto as a service to mankind (how often does a scholar so justify a project) with Teresa, Byron's mistress, as

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20 Boire ((1999), p 590):

> Colonial law assumes the role of Logos, what Fanon explicitly calls in *Studies in a Dying Colonialism* (1959), a 'language' that 'puts order into the original anarchy of the colonized country' … Fanon further develops this suggestively 'lingual' vocabulary … 'It is obvious that agents of government speak the language of pure force … the bringer of violence into the mind of the native' … In Fanon's suggestive image of lingual violence traumatically entering the mind of the native, moreover, we have, in addition to the tortuous image of oral rape, the seeds of a concept that Pierre Bourdieu would later describe as the '*habitus*' …

key mouthpiece for the story. But Teresa will not accommodate this lyrical portrayal – *it is not hers*:

> … the deeper he follows the Contessa into her underworld, singing her words … the more inseparable from her, to his surprise, becomes the silly plink-plonk of the toy banjo. The lush arias he had dreamed of giving her he quietly abandons … Six months ago he had thought his own ghostly place in *Byron in Italy* would be somewhere between Teresa's and Byron's: between a yearning to prolong the summer of the passionate body and a reluctant recall from the long sleep of oblivion. But he was wrong. It is not the erotic that is calling to him after all, nor the elegiac, but the comic. He is in the opera neither as Teresa nor as Byron nor even as some blending of the two: he is held in the music itself, in the flat, tinny slap of the banjo strings, the voice that strains to soar away from the ludicrous instrument but is continually reined back, like a fish on a line … (p 184). All he has done is to estrange himself further from Lucy … That is why he must listen to Teresa. Teresa may be the last one left who can save him. Teresa is past honour. She pushes out her breasts to the sun; she plays the banjo in front of the servants and does not care if they smirk. She has immortal longings, and sings her longings. She will not be dead … (p 208). *Byron in Italy* is going nowhere. There is no action, no development … The husband and the rival mistress are forgotten, might as well not exist. The lyric impulse in him may not be dead, but after decades of starvation it can crawl forth from its cave only pinched, stunted, deformed … It has become the kind of work a sleepwalker might write … (p 214).

The *motif* is a critique of the entire romantic/enlightenment enterprise and the promotion of an elevated view of mankind; even identity with 'woman' or some reconstructed gender compromise, is a lie when built upon the romantic canon. Like Lucy, who has accepted that the trade-off between dignity and survival is worthwhile and perhaps just, Teresa is 'past honour' and yet is somehow more vital than the scholar inheritor of the romantic tradition. His belief system has been a lie and when the lie is fully articulated, confronted with the ugliness it perpetrates in the lives of others, it can only stagger from its lair, 'pinched, stunted and deformed', any subsequent renaissance forewarned of a deadlocked illusory circle.[21]

Politically conscientious, the text itself is in turn strangely deadlocked in its portrayal of women. Soraya, Melanie, Lucy are clearly linked images in sexual politics. Lurie's ambivalence towards Bev, short-haired, unattractive, plump, is compounded by his admiration for her extraordinary selflessness and acuity with animals; from her he learns about humility and death, the 'ethic of care' which expects no reward. Teresa helps to deconstruct the romantic myth and like Lucy, is wedded to a strength in humble acquiescence, returning to a primal abandon. Certainly the rape discourse is a powerful acknowledgement of the hitherto unsayable. But the depiction of woman 'living out' the injustices of history through her acceptance of the child of rape, relays a message of uncertain impact. Clearly Lucy symbolises a rejection, perhaps a projected 'feminist'

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21 From this slightly different locus, Boire (1999), p 594, might also be speaking of the status-narrative-subject index of Enlightenment man as well as Colonial man and Colonised man when he says:

> Within white colonial law the alienated black native continually reads his own inferior status; the law functions, certainly as a narrative of disenfranchisement, but also as a never-to-be resolved patriarchal narrative – a contaminated family romance that disallows the male native a healthy transition to individuated subjectivity.

rejection of the ideology which has so 'perfected' her father, so demoralised all others.[22] Perhaps she also embodies the message that, in any social upheaval, women's freedoms are the most frail, 'making free' with women's bodies a savage fact of civic upheaval, along with fighting, looting. But it is bleak to see her left at that point, with no hope of redemption from brute biology, merely her adaptive capabilities – like Teresa, hers is the 'plink-plonk' embodiment of brute unsung survival. The deconstruction of enlightenment man, through confrontation with these brutal links *and* with the care and nobility at the heart of woman, fully exposed to his unprotected gaze, begins to look a little like a retreat into the myth of a (feminised) 'noble savage'.

CONCLUSION

There is much unknown and uncertain territory within the term 'human nature', and within the link between 'nature' and 'nurture', yet law and politics rely heavily upon these concepts. Such concepts will affect associated concepts, such as 'free-will', 'normality', 'gender', 'responsibility', 'identity', 'agency' and the 'reasonable man'. As *R v Smith* (2000) indicates, the House of Lords recognised that the notion of the reasonable man is becoming increasingly unreal and unworkable, yet generally the law continues to draw upon doctrinal models which derive from classical aspirations rather than observations concerning mankind.

The text of *Super-Cannes* suggests a view of modern man which departs radically from classical legal and political theory and doctrine, yet reflects closely upon the values and behaviours found in present society. In this review of modern man, *Super-Cannes* draws upon the language of anthropology and psychiatry, providing a novel conceptual challenge to classical models. *Super-Cannes* explores a model of society in which abuse of the oppressed is integral to the functioning of the dominant culture. Concomitantly, *Disgrace* traces, through the mind of an individual scholar, the delusive superiority fed by classical culture and rationality. The text has a 'local' significance in terms of Colonial tensions, but also a 'global' message which resonates with that of *Super-Cannes*, questioning the 'nature' of man, and especially his claim to integrity.

Super-Cannes explores the worlds of super-corporations, executives, the pursuit of profit, the power of the media, the links between sex, violence, libido, normality, gender relations and the psyche. In particular, *Super-Cannes* considers the links between the worlds of corporate profit, the media, pornography and prostitution, and posits a trajectory between 'normal', exploitative consumer society and a correlative 'moral atrophy'. Empirical research suggests that the model of man posited in *Super-Cannes*, of a 'spectrum' of exploitative inclinations, in which all members of society are implicated, is more accurate than the 'deviancy' model, where a 'minority' are classified as deviant. Studies linked to the commercial sexual exploitation of children especially support this view. Feminist theorists and political commentators have debated such issues especially,

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22 Again, a different – this time feminist – locus is discoverable in Boire's comment ((1999), p 597):

> Political freedom (and colonial subject formation), it would appear, seem to involve a necessary counter-violence or, more precisely, an irrevocable Oedipal desire that leads to a complete amputation of paternal and social laws.

given the possible direct link between sex and violence, in relation to the laws of censorship: it continues to be characterised largely as a 'contest' between 'feminists' and 'freedom of expression'. Yet the links postulated between libido, sexuality and violence in *Super-Cannes* are borne out in studies of 'normal' subjects and of sex offenders. There are empirical similarities between primate behaviour in general and human behaviour in particular – between anthropology and primatology. Similarities obtain with regard to individual and group practices, and male-female behaviour patterns. The 'enlightened citizen' claiming his 'freedoms', the 'reasonable' man, is thus further understood in terms of Ballard's model – a 'reformed hunter-killer of depraved appetites … let loose in the city state'.

Both *Super-Cannes* and *Disgrace* pose radical questions in our understanding of free-will, moral agency, private and public life, challenges which demonstrate that 'feminist' concerns are of universal import. Yet, in the very act of asking such questions, both texts appear to retreat into a notion of feminine essence. *Disgrace* further disrupts the classical view of civilised man by tracing the 'history' that has produced the values of enlightened scholarship. The history is one of unacknowledged duality – of a 'brutalising' enlightenment. The individual subject-product of this duality is revealed as a complex carrier of ethical elisions. Ethically incompatible behaviours are rendered entirely coherent to the inner self. At one and the same time the subject can be deeply exploitative in his relation to others and yet believe himself ethically conscientious. This contradiction is most clearly evident in his relation to the female sex. The issue of rape becomes a simulacrum for the nexus between the private and the political: the ethical failure of sexual relations is symptomatic of more widespread cultural and political failures.

Thus, just as *Super-Cannes* charts the journey into the dark interior of 'reasonable man', *Disgrace* charts the unveiling of enlightenment man, the man of reason. It is particularly pertinent to reflect on the implications of such revision in the flurry to declare this an age of human rights, when it is the powerless, the woman, the child, the displaced – the 'flotsam' of *Super-Cannes*, who most need representation. Whilst the abuses of power, the melding of myth and romanticism, of contempt for others and self-aggrandisement demonstrated by Lurie are not matters of universal practice, they are certainly demonstrative of the fragmented and contradictory factors which contribute to the formation of the man of reason.[23] We may recall Ray Wyre, who rejected the 'deviancy' model of behaviour, instead favouring a 'continuum' model – anathema to much legal theory and doctrine, but comprehensively explored in the politically and psychologically 'aware' fiction of the year 2000. Whilst fiction can engage freely with new imaginative and epistemological findings, in the interests of justice, law must approach its process of adaptation with more caution. At the same time it may be noted, however, that

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23 Yet again, Boire's critique, apt to the 'colonial' aspect of *Disgrace*, also resonates (as Coetzee himself intends the colonial-feminist nexus to do) as a critique of the masculine-feminine nexus – read 'asylum of the colonial worlds' in the following passage as a metaphor for the masculine to feminine 'asylum':

> ... within the asylum of the colonial worlds there is no direct transition or access, no General Will, no transparent mirroring where a mythified citizenry might read its own shared interests in a communal Law. Instead, colonial citizens, as they move from family to nation, read a contaminated, ambivalent script where, as Bhabha argues, the 'collaborations of political and psychic violence within civil virtue, alienation within identity' … [can be likened to – Fanon] a 'Manichaean delirium' (Boire (1999), p 600).

the disciplines hitherto embraced by law – particularly classical philosophy, or for that matter, 'classical' psychiatry and medicine – reflect cultural as well as 'scientific' predilections: a broadening of law's epistemological church need not necessarily predicate a diminution in ethical practice. Yet whilst law may come to accommodate a broader vision of human nature in its doctrinal peregrinations, broader sources for its illustration, perhaps even a 'continuum' model of aberrant behaviour, it will be difficult and ethically challenging to negotiate the territory that is identity: between 'individual' and 'group', between man, woman and child, human frailty and human predation. Any such enterprise involves a re-conception of that thinly traversed yet richly and selectively mythologised 'empty city' that is 'human nature'. Intimately bound to the concept are so many other everyday tools of philosophical and legal understanding – the polarised concepts of 'nature' and 'nurture', of 'normal' and 'abnormal', reason and unreason. As we have seen, conceptions such as that of the reasonable man – reliable, knowable, stable – may be misleading to legal taxonomy and doctrine. Most strikingly such reconceptions strike at the heart of law's engagement with the human subject through the simply arraigned intermediary 'free-will'.

The mystery of human nature, of free-will, of the moral agent, will be pursued as the ensuing chapters chart a journey through central works of fiction through the 20th century. The implications carried by such mystery, of the proper role of the law in its regulation of the human subject, of the relation between law and morality, between the production of 'gender' and 'culture', is extensively explored in the next chapter, which, like the books of the year 2000, carries with it the anxieties of a *fin de siècle;*[24] a moment just prior to the 20th century – the 1890s.

24 Lyn Pykett, in her *Introduction to Reading Fin de Siècle Fictions* notes the commentary generated by issues as unresolved at the end of the 20th century as they were in the 19th century – Pykett ((1996), p 19):

> For Showalter, the impending end of the twentieth century is a replay of the 1880s and '90s … In Showalter's account the main difference between the two *fins de siecle* lies mainly in the fact that the end of the twentieth century is a repetition, a kind of belated belatedness …

THE 1890s – THE EMPTY WOOD: *TESS OF THE D'URBERVILLES*, RAPE, SEDUCTION AND PROVOCATION: EFFACEMENT OF IDENTITY AT THE *FIN DE SIÈCLE*

Tess of the d'Urbervilles by Thomas Hardy is a classic English novel of the late Victorian period, a tragedy of perennially urgent themes. Briefly, it is the story of a young girl, Tess Durbeyfield, ignorant and innocent of sexual matters, who experiences a sexual encounter with Alec d'Urberville, a local member of the nouveau-riche. She gives birth to an illegitimate child, who subsequently dies. Later she falls in love and marries Angel Clare, a pleasant young man. On their wedding night, he confesses a youthful peccadillo. She in turn feels permitted to disclose her past, but her husband's idealisation of her purity means that he cannot accept these facts. He insists that they part. The young woman spends some time in hardship and poverty, but feels unable to appeal to her estranged husband. Destitute, convinced that her husband is lost to her and careless of her fate, she allows the seducer to establish her as his mistress, partly in order to secure aid for her impoverished family. Meanwhile her husband has relented. He returns to see his wife. Desperate to regain the love of her husband and in an attempt to negate the past, she kills her seducer. Husband and wife are reunited. After a brief period as fugitives, the young woman is captured, tried and hanged for the murder.

In keeping with Victorian literary/cultural constraints, the sexual scene is indicated only circumstantially. Nevertheless, textual indications most strongly indicate rape. This study will explore, as in 'real' life and law however, that demonstrating the category and agencies driving an event 'beyond reasonable doubt' involves an elaborate assembly of disparate elements. 'Doubt' is as much the product of cultural norms as of empirical finding, whilst what is 'reasonable' remains very much in the eye of the beholder.

INTRODUCTION

Tess of the d'Urbervilles is a book so powerful in its depiction of a person of honesty, integrity and powerlessness overwhelmed by factors beyond her control and drawn towards a terrible end; of her condemnation by law at that end – with no formal mitigation drawn from preceding events – that a person with no direct connections with the study of law must be troubled by it. Two issues of legal note arise in the text – a possible rape, and a murder. Drawn first to investigate the doctrinal position regarding the circumstances surrounding the murder, and comparing doctrinal developments at the close of the 19th century with the close of the 20th century, disquieting similarities emerge. This doctrinal exploration (see Williams, M (1999b)) forms the basis of Part II of this chapter.

A story involving a probable rape, murder and an execution but little *law* might seem at the very least a conscious omission on the part of the author. When that omission is

coupled with the strongest intimations that the *spectre* of the law promotes indifference or injustice, a moral imperative commands that the sub-text to the omissions and spectres of law be explored.

The absence of a murder trial in Tess serves as a reminder that the law's response to such facts would have been swift and draconian. Yet the narrative pleads that the law thereby enacts a substantial injustice. How would modern law respond to the case of *R v Tess of the d'Urbervilles*? A comparison of the narratives of law, and of literature reveals the latter to be a prescient source of practical jurisprudence as Tess explores the notions of social, psychological and physical/legal death. Our understanding of words such as 'provocation' and 'self-defence' is rooted in history, a history which reflects social and juristic prejudice and paralysis. This obliquity is further demonstrated in the enigmatic portrayal of the role of sexuality – of 'courtship', seduction and rape. The histories of the law of provocation, of seduction, rape and associated caselaw reveal the intimacy of links between individual and institutional conquest, a savage private sphere from woodland to drawing room.

Thus *Tess of the d'Urbervilles* is a text which stimulates jurisprudential enquiry of some breadth. The initial impetus to writing this chapter was to 'assay' the clearly sophisticated *rationale* underlying the message of *Tess*: that a person of goodness and virtue would have been viewed by the law as tarnished and malevolent. Apart from the desire to clarify the anomaly and the clear indication in the text that the class and gender of this malefactor seemed relevant to her fate, the study was begun with no particular preconception of how the fictional account would compare or link with that of law, or of the doctrinal issues that might become implicated. Attentive reading of the text reveals that the rape *itself* was not (as one might expect) portrayed as deeply traumatic and life-changing, despite the textual indication of a non-consensual and invasive encounter. Initially therefore, the study focused upon which events or beliefs in the book led the 'realistic' – that is, driven by feasible responses and decisions – character of Tess to bloodshed, and how the law would view such responses: these concerns motivate the second part of this chapter, linking to current as well as contemporaneous caselaw.

At the time of writing, however, an article on *Tess* was published by a leading academic in English Literature, asserting that Tess was both a willing participant to the sexual encounter as well as a malevolent character. This surprising assertion demanded a re-examination of the denominations 'rape' and 'seduction' and of the provenance of this 'modern' interpretation which, in its overt reading *against* the spirit of the text, reveals a persistently 'skewed' viewpoint, wonderfully mirrored in past and, to some extent, present legal culture.[1] This chapter is therefore of necessity, lengthy, looking first, at the

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1 Author's note: this other issue – the rape/seduction scene, though depicted in veiled language, seemed to leave little doubt as to the depiction of perpetrator and victim. But by chance, on a long train journey through Wales(!) I read a collection of essays, designed for popular consumption by Professor John Sutherland, subtitled 'Puzzles in 19th Century Fiction'. One essay glossed *Tess*. It became clear that what I considered to be virtually incontestable aspects of the text (as to both 'legal events', but chiefly with regard to the rape/seduction scene) could be metamorphosed, by adroit, persuasive rhetoric, into something quite different. The essay did not simply amount to a different point of view. Having studied the text of *Tess* in detail for the previous work, I was sure that I detected odd trails and adroit elisions in the essay which created a very different impression of the person and text of *Tess* from that evident in the original. Particularly striking was the degree to which the transformation of fact and opinion could produce a credible version of events radically different from that which I believed to be true. In short, Sutherland had arranged a cogent but, I believed, wholly erroneous and misleading 'case for the prosecution': I felt bound to investigate a response ... [cont]

social and legal foundations of the notions 'rape' and 'seduction' and secondly, the historical and current significance of the victim-turned-perpetrator in the doctrinal models of 'self-defence' and 'provocation'. Finally, the chapter reflects upon the significance of this exploration of 'the particular' in the more general purview of jurisprudence.

As a late Victorian writer Hardy laboured under conflicting tensions[2] – wishing to depict the moral frailties and weaknesses of individuals, great and small, his writing was received with some ambivalence by a bourgeois Victorian society guarding its claim to moral propriety. A self-educated natural sceptic, Hardy explored conflicts in the philosophical and theological domains which mirrored and to some extent presaged *fin de siècle* and early 20th century anxieties concerning the nature of being: this too posed a threat to more traditional sections of society. His extensive diaries and notebooks, which often formed the basis of fictional developments, referred to contemporary philosophical debates, current affairs and newspaper accounts of individual tragedies and incidents. Of rural background, Hardy understood, practically and intellectually, the hardship and privations of peasant life and the pretences of the bourgeoisie. Thus Hardy was alive to the likely repercussions of his writings: textual ambiguities, as exemplified in this sexual encounter, at least in part reflected the social constraints imposed upon him as author and upon the experiences to which his characters could lay claim.[3]

PART I
POLAR VERSUS RELATIONAL, 'SEDUCTION' VERSUS 'RAPE' – THE CULTURAL OPPOSITION IN REPRESENTATION

The courtroom is not the only location in which a trial may take place. In 'Is Alec a rapist?' (Sutherland (1996)) Professor John Sutherland conducts an enquiry into the nature of the sexual encounter that occurs in *Tess of the d'Urbervilles*. As occurs in many trials both within and outwith the courtroom the evidence in the fictional account is open to some conjecture and, in common with the zealous courtroom advocate, Professor Sutherland is selective in the interpretation and use of evidence. Thus in reading his account one may begin with an enthusiasm to discover the new insights which literary criticism can provide for the legal issue and potential analogues with 'real' possible rape

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1 [cont] The resultant detailed examination forms Part I of this chapter; the original text appeared as a journal article (Williams, M (1999a)). Together, both sections reveal disquieting parallels with life at the end of a further century.

2 Hardy's writing cuts across many conceptual boundaries; critical responses appear in several fields. Texts are numerous; foundational scholarship can be located in, for example, Williams, R (1987); Widdowson (1989); Hawkins (1989); Millgate (1982).

3 Rooney (1998), in her wide ranging critique, asserts 'the meaning of the contested interaction from Tess's point of view is radically unavailable, and so we too face the problem of reading the silent, seductive Tess as a text, confined by the limits that mark every reading of the scene of sexual violence' (p 475). The evidential difficulties in such events are indeed problematic but, as will be seen, although Tess herself may – culturally – be disabled from anatomising her experience, the textual indications concerning the nature of the 'contested interaction' take us beyond the silent, and apart from the seductive.

cases. Yet the encounter ends with the realisation that the juristic analogue in this particular encounter between law and literature is more sinister: it is in the partiality of the account itself, a partiality which mirrors some of the devices used in legal advocacy.

Sutherland's piece begins with an interesting survey of 19th and 20th century literary accounts of the novel, accounts which vary in their view of the sexual encounter. Sutherland uses this historiographical background to refute the suggestion that Tess was raped:

> She who was seduced in 1892 is she who is raped in the permissive 1960s (Sutherland (1996), p 203).

With this laconic phrase, Sutherland suggests that initial critical readings of the text of *Tess* which view the scene as one of 'seduction' are, by the 'permissive' 1960s, displaced by critical readings which 'cry rape'. However, as will be seen, independent reference to the legal history of rape and seduction in both English and American caselaw reveals a more complex background.

Sutherland's analysis is focused upon the textual evidence of the sexual encounter and is similar to the analysis that would take place in a legal context; certain facts, circumstantial evidence, points of view and verbal statements made by the parties to the encounter are selected as material to the case. The case is of some additional interest to lawyers because it involved the suggestion, as in some 'real life' sexual offence cases, that the act took place whilst the victim was asleep. A review of Sutherland's account in conjunction with the text of the novel provides an opportunity to test his reading of the evidence.

Tess versus Sutherland

Just prior to the sexual encounter, Tess is obliged to accept a ride on horseback from Alec. Exhausted, she falls asleep momentarily and Alec places his arm around her waist. Tess responds with 'a little push' which almost unbalances Alex. Sutherland's gloss reads:

> A little push ... stresses that even when her body is dormant, Tess's purity is vigilant and well capable of defending itself. This is important, since she will be sleeping when the seduction/rape occurs (Sutherland (1996), p 206).

Already Sutherland is establishing the foundation of his view that Tess is more participant than victim. In making this connection between the early and later 'sleep' response however, he does not acknowledge a material fact provided by the text: the 'little push' ensues from a 'moment' of oblivion; whereas just prior to the later time when intercourse takes place, Tess, we are told, 'was sleeping soundly' (*Tess*, p 119). In addition, one may question whether the physical dormancy of sleep, momentary or otherwise, can be opposed by an autonomously active 'vigilant purity' which is 'well capable of defending itself' – Sutherland clothes an abstract virtue with independent and kinetic power.

Reviewing the textual account of the ride on horseback prior to the sexual act, Sutherland concludes:

> Tess repulses his love-making as they ride, without ever distinctly denying that she loves him. He is much encouraged by her lack of frigidity (Sutherland (1996), p 207).

Yet the text tells us otherwise:

> 'Tess, why do you always dislike my kissing you?'
>
> 'I suppose – because I don't love you.'
>
> 'What am I, to be repulsed by a mere chit like you?'
>
> 'Put me down, I beg you. I don't mind where it is, only let me get down sir please!' (*Tess*, pp 114–15)

Alec informs Tess that he has made gifts to her impoverished family, a statement which may be intended to increase Tess's sense of indebtedness to her rescuer. Yet even then when asked 'Tessy – don't you love me ever so little now?' she regretfully admits 'I'm grateful … but I fear I do not' (*Tess*, p 117). Thus in direct contradiction of Sutherland, Tess denies any love of Alec twice, and the text merely indicates that Tess is willing to voice her past anger as opposed to remaining frigid, not simply that she 'lacks frigidity'. Instead the text indicates her clear discomfiture – she is told that they are hopelessly lost in the foggy forest, miles away from the village and feels so compromised by his gift to her impoverished family that we are told 'she wept outright' (*Tess*, p 117). In addition, the clear imbalance in status and power between Tess and Alec adds to her entrapment. There are verbal instances of her will being overborne ('on one condition'; 'whatever you may yourself feel about it') and Alec's remark 'That is devilish unkind!' invokes the humble response 'I beg your pardon, sir' whilst his 'what am I, to be repulsed so by a mere chit like you … I won't stand it!' is a clear assertion of social superiority. Tess's demeanour is awkwardly resistant, she 'writhes uneasily on her seat' (*Tess*, pp 115–16) and asks to be released, behaviour not easily characterised as 'lacking frigidity'.

Alec leaves Tess to rest deep in the forest and returns to find her sleeping soundly. The narrator does not describe the sexual encounter, but discourses upon its significance, concluding that 'an immeasurable social chasm was to divide our heroine's personality thereafter' (*Tess*, p 119). Sutherland glosses this narrative as the 'lofty moralising' of a narrator who 'prates about olden times' (Sutherland (1996), p 208). Certainly the narrative does not conclusively classify the sexual act, but the textual suggestion that Tess's guardian angel, like Tess, is asleep; that 'the coarse' (Alec) 'appropriates' the finer (Tess); reference to the 'possibility of retribution' and of 'the same measure' being 'dealt' 'even more ruthlessly' by Tess's mailed ancestors towards peasants of ancient times (*Tess*, p 119) all involve active verbs associated with *the will being overborne* rather than consensual intercourse. Sutherland clutches at the fact that Alec is not as 'ruthless' as those ancient ravishers as somehow lending support to this case and reiterates his analogue regarding sleep:

> The point is made earlier in the chapter that even when asleep, Tess is able to fend off unwanted sexual advances. Why does she not protect her imperilled virtue with one of those timely 'impulses of reprisal?' (Sutherland (1996), p 208).

To support his case still further, Sutherland refers to Tess later upbraiding Alec:

> She does not accuse him of rape, but of having duped her 'I didn't understand your meaning until it was too late'. Nor, when upbraiding her mother for not warning her against men, does Tess claim that she has been raped … (Sutherland, p 208).

'I didn't understand your meaning' is indeed an indication that, once awake, consent is either falsely induced, or never given. If Tess was indeed 'duped' – misled as to the nature of the encounter (consent induced by fraud) – this would rightly invalidate the consent. The most likely explanation of this 'misunderstanding' is sexual ignorance. Tess may not have understood the act of intercourse, a possibility not explored by Sutherland, although this was a common and now well documented phenomenon, resulting from the infantilising ignorance forced upon women. There are several 'classic' cases: *R v Williams*,[4] where a conviction for rape was upheld where a singing master had engaged in sexual intercourse with a girl pupil by pretending that it was a method of training her voice. In *R v Case*,[5] a medical practitioner represented to a girl that he was 'treating' her medically; in *R v Flattery*,[6] a girl submitted to intercourse believing that the act was a surgical operation. Tess herself supports this contention; she later rebukes her mother:

> How could I be expected to know? I was a child when I left this house four months ago. Why didn't you tell me there was danger in men-folk? Why didn't you warn me? Ladies know what to fend hands against, because they read novels that tell them of these tricks … (*Tess*, p 131).

Yet Sutherland dismisses this extensive plea (which indicates real anatomical ignorance – 'Ladies know what to fend hands against') with the gloss 'Nor, when upbraiding her mother for not warning her against men, does Tess claim that she has been raped' (Sutherland (1996), p 208) – for Sutherland, failure to use the *word* 'rape' is conclusive.[7] Yet had the plot so centred upon the crime of rape, clear rape in Tess's mind and published abroad by her as such, insuperable demands would have been made upon the plot. The whole novel centres upon her unwitting victimhood and that she is 'a pure woman'[8] despite society branding her otherwise. It is an indictment of Victorian double standards, which by the 1890s a few enlightened members of society could begin to critique. A novel centred upon a more overt rape would have been utterly dominated by crude imperatives. In addition, then, as now, rape was one of the most difficult crimes to prove, since it generally occurs without witness other than the parties themselves and fear, ignorance, unconsciousness (or a combination of these) can mask the non-voluntary stance of the victim.

It would seem that Hardy appreciated this. Of Tess's view of Alec, the narrator much later tells us:

> She had never wholly cared for him, she did not at all care for him now. She had dreaded him, winced before him, succumbed to adroit advantages he took of her helplessness; then, temporarily blinded by his ardent manners, had been stirred to confused surrender awhile: had suddenly despised and disliked him, and had run away (*Tess*, p 130).

Sutherland uses this self-same passage to suggest that Tess is sexually aroused, a 'willing, if misguided, participant of her own undoing' (Sutherland (1996), p 209) – in particular,

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4 [1923] 1 KB 340.

5 (1850) 4 Cox 220.

6 (1877) 2 QBD 410.

7 As may be seen, the word rape is frequently avoided by 19th century culture: from writers of fiction to witness statements, euphemisms are preferred to the precise noun.

8 *Tess of the d'Urbervilles* is subtitled 'A Pure Woman'.

that the word 'stirred' suggests 'erection',[9] 'physical reciprocation' which is a response to Alec's 'stimulating foreplay' and Tess's 'aroused feelings' (Sutherland (1996), p 209). Yet objectively, rather than feminine potency and 'willing participation', the passage evokes Tess's impotence and active dislike; she experienced 'dread', 'helplessness', she 'winced' and 'succumbed' (*Tess*, p 130). 'Stirred' Tess may have been, but it is to 'confused surrender' not the equality implied by Sutherland's 'physical reciprocation'.

Given the context, of Alec's deliberate exploitation of his social superiority, worldliness and his adroit use of his gifts to Tess's family in order to increase her sense of obligation to him, it seems that Tess is 'stirred' to 'confused surrender' of some part of her *emotional* self *after* the sexual act. Whilst honestly maintaining her stance that she does not love Alec, she nevertheless 'succumbs' to the relentless pressure of his alternate threats, attentions, scorn and favours in that she feels 'grateful' yet 'hampered' by his gift to her family; her 'confused surrender' simply an unwilling diminution of her formerly obdurate stance. Not only is Sutherland's *interpretation* of evidence a departure from the indications in the text. His analysis relies upon a glaring omission of evidence – albeit circumstantial. Observing her later with the product of the encounter – an illegitimate child – Tess's peasant companions agree:

> A little more than persuading had to do wi' the coming o't, I reckon. There were they that heard a sobbing one night last year in The Chase; and it mid ha' gone hard wi' a certain party if folks had come along (*Tess*, p 140).

This is a clear textual suggestion that, although Tess may have borne her fate without recourse to law, there is a local impression, corroborated by unidentified witnesses, that Tess was the victim of non-consensual intercourse, which is rape.

As already indicated, had Tess 'cried rape', the complex tale of emotional and social dislocation that is *Tess of the d'Urbervilles* would have been denied. Instead, the text explores the subtleties of victim experience – strongly mirrored by modern accounts – the exploitation of unequal gender and power relations, the fatalism of the peasant class; the scepticism and readiness of wider society to judge and condemn in error; the isolation and sense of guilt experienced by the victim. All of these issues, still of contemporary relevance, are clearly signalled by the plot.

The legal implications of the scene in *Tess of the d'Urbervilles* have been explored with great scholarship by Davis (1997) who examines not only some of the caselaw of the period but also provides a fascinating study of the probable influence of contemporary newspaper articles, noted by Hardy, upon earlier textual versions of the plot. Davis concludes that the scene *does* appear to depict rape; like Sutherland however he feels bound to assert that the ambiguity at the heart of the text allows Hardy to use the novel form:

> ... to argue for a definition of female purity that includes Tess's sexual nature and her sexual responses to men (Davis (1997), p 228).

Such an approach implies a reading of the text which appears sympathetically 'feminist' – asserting that a woman can be both 'pure' and sexually responsive. This leads Davis to conclude that:

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9 Sutherland appears to imply here female 'erection'.

> Alec's brutal mastery of Tess through rape makes possible his subsequent mastery of her through seduction. Hardy wants the equation to read a particular way: Tess is seduced because she was raped (Davis (1997), p 230).

Leaving aside the fact that Davis, like Sutherland, is here assuming that the word 'seduction' can be juxtaposed with that of 'rape' unambiguously – questionable bearing in mind the overt variation in 'workaday' use of the word as well as at the more subtle deconstructive level – he appears to be implying that, having been 'mastered' non-consensually through rape, Tess becomes more receptive to a less involuntary, perhaps more sexually responsive liaison with Alec. Yet again, the text of Tess militates against this reading. Even after the rape scene, d'Urberville continues to be Tess's employer and the benefactor of her destitute family; a destitution which Tess blames in part upon herself. Tess attempts to retain some shred of dignity in this aftermath – wearing only the clothes which she can pay for herself and working in the fields. Despite Alec's protestation that she need not work and can 'clothe herself with the best', Tess replies 'I should be your creature to go on doing that, and I won't'(*Tess*, p 125). She allows Alec to kiss her on the cheek, but is 'indifferent' to this and repeats her assertion that she cannot love Alec, despite her apprehension that future events[10] might justify her being less than truthful on the point.

To many readers, the idea of rape as a *prelude* to seduction (given the view of the word as intimating sexual responsiveness) is, at the very least, anomalous. More consistent with the particular and overall themes of the novel is a reading which acknowledges that the nature of Tess's relationship with Alec d'Urberville in the 'few weeks' (*Tess*, p 123) subsequent to the assault in 'The Chase' is one of abject victimhood. The separation of 'rape' from 'seduction' in Davis's thesis springs in part from his otherwise compelling analysis of Hardy's *Literary Notes* coupled with a belief that the existence of similar Victorian rape cases could have given justice to Tess:

> Such laws and case rulings suggest that the courts would have interpreted Tess's situation as a case of rape. Why, then does Hardy keep Tess away from an apparently sympathetic judicial system? (Davis (1997), p 227).

Concluding that:

> Hardy, I believe, wanted Tess's sexuality and the matter of her purity to be considered in the minds of his readers rather than argued (with perhaps predictable results) in a fictional court of law (Davis (1997), p 228).

Yet the case of Tess is miserably typical of the type of case that might well then, as now, have failed. For although the 'successful' caselaw is similar in *some* facts – as we shall see – Tess's account would be undermined firstly by having allowed herself to be led – without witness – into a wood and secondly by her lowly status as against that of her suave attacker. Tess's tale is thus largely *untold* by precedent, like many hundreds of cases unreported or unpursued.

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10 Probably pregnancy: 'If I did love you I may have the best o' causes for letting you know it. But I don't' (*Tess*, p 126).

'Seduction' and 'rape': blurred conceptions

Davis's evidence that Hardy himself referred only to the 'seduction' of Tess is not inconsistent with this: the word 'rape' was virtually unsayable in the Victorian mouth whilst 'seduction', 'ruination', etc, were words used broadly, with little reference to the presence or absence of consent. As a creature of the patriarchal logos, the word served a multitude of material and ideological purposes.

Of contextual relevance is the subtle interplay of values and assumptions revealed by the laws of the period; laws which appear to have been explored at times more completely by American than by English academic commentary. Sutherland's case in part springs from the verbal and conceptual anomaly that was played out in Victorian law, in the ambiguous relationship between the words 'seduction' and 'rape'. For some Victorian commentators – as for Sutherland – 'seduction' more readily implies mutuality, complicity. In present assumptions of sexual liberation and equality, 'seduction' is no longer a crime,[11] yet we may still find ourselves speaking of a 'victim' of seduction. At the time of *Tess*, seduction could be subject to legal notice. In English law, the terms of this legal response were rooted in the history of women as property. In *Jason v Norton*,[12] where Norton entered the plaintiff's house and made an assault upon his daughter thereby 'getting a bastard child upon her', the action upon the case was one in the power of the plaintiff father 'for the loss of her service' – *per quod servicium amsit*. In the 20th century American case of *Wendt v Lentz*,[13] an action for seduction, the defendant had sexual relations with the plaintiff's 'previously chaste' 15 year old daughter. According to the case, this resulted in the girl becoming 'wild and unmanageable' and she was subsequently committed to a home as 'incorrigible'. The defendant was held not responsible for the plaintiff's loss of his daughter's services, since it was concluded that the girl's 'abnormal' behaviour could not be wholly attributable to the defendant. The case gave rise to the response by Edgerton (1929–30) that:

> ... the defendant's unauthorised interference with the plaintiff's interests was not negligent, but intentional; and it is commonly recognised, both by the law and by public opinion, that the risk even of exceedingly unlikely consequences of an unauthorised and intentional interference should fall on the perpetrator rather than the sufferer. If A tramples the valuable plants in B's garden, it is no defense that he reasonably mistook them for weeds (Edgerton (1929–30), pp 233–34).

Thus in the bizarre displacement activity which often typifies law, the 'victim' of seduction is clearly identified as the *father* whose *property* has been interfered with. Even where that female chattel later exhibits such wrongful conduct as to make her analogous to a weed, that weed is still as much actionable property as the carefully tended valuable plant. Though Edgerton's conclusion appears to occupy moral territory:

> ... without being Victorian one may regret on social grounds a decision which encourages or gratuitously refuses to discourage the seduction of fifteen year old girls (Edgerton (1929–30), p 236),

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11 Note however the recent resurrection of the notion of criminalising 'seduction' in England in the context of schoolteachers and their 16–17 year old charges – 'Teachers criticise "seduction law" plan' (1998) *The Times*, 4 September.

12 (Mich 1653) Style 398, vol 82 English Reports; cited in Baker and Milson (1986) p 353.

13 (1928) 249 NY 253; 164 NE 42.

the concern is 'social' in that the predominant masculine order is keen to preserve property rights. In *R v Mycock*,[14] an action for abduction, Willes J uses a similar analogy:

> ... the prisoner had no more right to deprive the father of the girl of his property, as it were, in her, and his possession of her, than he would have a right to go into his shop and carry away one of his telescopes or optical instruments.[15]

The language and forms of these cases reveal that women were very far from being the autonomous beings that Sutherland's use of the word 'seduction' assumes; in some the masculine 'duel' over ruined property occludes evidence bearing a close resemblance to the facts of rape. This is because the focus of the action was upon the preservation of *physical* integrity; whether the girl consented or understood was irrelevant to the men of law. Not only might seduction be classified as a trespass against property, a tort; in 1921, 37 American jurisdictions maintained statutes defining seduction as a crime, defined subject to various limitations and exceptions, as:

> The act of a male person in having intercourse with a woman of chaste character under promise of marriage, or by the use of enticement or persuasion ... in jurisdictions wherein the statute is not confined to seduction under promise of marriage, but expressly covers seduction, it is interesting to note that the statute has been construed to be broad enough to cover practically every case of intercourse with consent. The word 'seduce' (in such statutes) is used in its ordinary legal meaning and implied the use of arts, persuasions, or wiles to overcome the resistance of the female who is not disposed of her volition, to step aside from the path of virtue ... Any seductive arts or promises, where the female involuntarily and reluctantly yields thereto, are sufficient (Humble (1921), p 146).

No doubt there were men who suffered unjustly from measures which so readily assumed the overweening power of the male. Nevertheless the passage is interesting in that it conflates the terms 'intercourse with consent' with 'involuntary' yielding. The dominant references to acts designed to 'overcome the resistance' of the female who is 'not disposed of her volition' seem closer to definitions of rape, recognising that the will can be overborne in ways other than violence and that 'reluctant yielding' to whatever pressure, is not consent. Certainly in the realm of more overtly commercial 'contracts' such duress could operate as a vitiating factor. Yet in the realm of contract too, woman may be effaced by her identity with property – in the English case of *Moss v Moss*,[16] consideration was given to whether a marriage contract could be annulled on the basis that the wife was pregnant by another man at the time of marriage. In the language of contract utilised by the court, the issue was 'whether the mistake about the condition of the bride, or indeed any bride found not to be intact, was a mistake as to her identity, or merely a mistake as to the *quality* of the *bride* thing' (Williams, M (1999b), p 189). Thus underpinning the actions for seduction lay the very complex network of social values which made feminine autonomy unsayable – the autonomy of desire, as much as that of repulsion. The diverse circumstances encompassed by the words 'seduction' and 'rape' contained a penumbral overlap, made less transparent by the identity created in law between the concepts 'woman' and 'property' and by the resultant need to crush

14 (1871) Cox CC 28.
15 *Ibid*, p 30.
16 (1897) PD 459.

recalcitrant autonomy. The case of Tess is a *locus classicus* of the penumbra; a reminder that for all the vagaries of the rape-seduction scenario women were, by reason of their weaker bargaining position, poor status and education (not to mention a likely physical disadvantage) more vulnerable to exploitation. Strict legal analysis of such facts, of the manipulation of sexual ignorance, of superior status used to negate any attempt to exercise free-will or the right to consent, would to most modern jurists, fulfil the definition of rape – the novel is *not* about a girl who is aroused but cannot say so; this would have been easy to depict with weak protestations and coy refusals. Nor is it a tale of brutal rape. It reflects the much more common and subtle concatenation of circumstances which allowed young men to exploit their greater worldiness and ease with opportunism and were largely indulged by the world for doing so. Later, Alec admits this:

> What a blind young thing you were as to possibilities! I say in all earnestness that it is a shame for parents to bring up their girls in such dangerous ignorance of the gins and nets that the wicked may set for them, whether their motive be a good one, or the result of simple indifference (*Tess*, p 394).

Reviewing the evidence so far, we can make the following summary of the sexual encounter. Prior to the act, Tess is compromised by her relation to Alec, her employer's son; he has cajoled her, threatened her, made her feel indebted on behalf of her family and finally, deliberately or otherwise, disorientated her. Tess is left in the wood in an exhausted state. She falls into a sound sleep. Alex returns and embarks upon intercourse. At some point during this event Tess wakes up; she does not fully understand what is happening until it is too late – does not know what to 'fend hands' against. Nevertheless, according to witness testimony, she is 'sobbing' at some stage in the encounter. By her own later account she was 'a child' who did not know of the 'danger in men-folk' and even Alec describes her as having lived in a state of 'dangerous ignorance'. This suggests that, even if Tess was no longer asleep, penetration was initiated without her full understanding or consent and then, as now, this should have been classified as rape. It may be that penetration began whilst Tess was sleeping soundly and that, given her anatomical ignorance she was, upon waking confused enough for completion of the act to occur ('succumbed to adroit advantages he took of her helplessness'). Like many rape victims, Tess feels foolish and guilty for having allowed herself to fall into such a trap and is unsure as to whether she has any claim to moral integrity. When she later meets a religious slogan-writer inscribing 'THY, DAMNATION, SLUMBERETH, NOT', she asks 'suppose your sin was not of your own seeking?' (*Tess*, p 128) thus quite independently classifying the act as *unsought*. Once the deed is done, Tess lapses into a state of fatalistic apathy. This is a credible response: aware of the contribution made by her own ignorance, a girl in her lowly position would also have had difficulty sustaining a complaint against a gentleman, albeit a gentleman who has proved himself calculating and amoral. Forensic science, such as that which recently identified President Clinton, could not have aided Tess and the social hierarchy coupled with the fatalism of the peasant class, clearly evidenced in the book, would have confirmed her view that she was powerless in the matter. For a short time Tess remains in the neighbourhood; during that time she cannot bear to think of her former self; she feels 'sorrow', is 'listless', 'indifferent' and is still prone to tears. Alec is now cold and mocking, although Tess allows him to kiss her cheek – 'If you wish … see how you've mastered me' (*Tess*, p 126) she answers 'indifferently'. It

is *after* this stage in the text that we meet the passage to which Sutherland alludes, thus 'stirred to confused surrender awhile' could well refer to Tess's submission after the event.

Sleep, sex and the law

As has been noted, Victorian caselaw gives clear indications that women could be tricked into allowing intercourse as a result of their sexual ignorance. In addition, the caselaw which most closely mirrors the case of Tess has long established that rape can occur whilst the victim is asleep. In *R v Young*,[17] the prisoner 'proceeded to have connexion' with the victim, she 'then being asleep'. Held, the prisoner was guilty of the crime of rape. In *R v Mayers*,[18] Sarah Mayers testified that she:

> ... fell asleep; the first thing after that which I remember was finding the prisoner in bed with me, he was agate of me when I awoke; ... I cannot say that he did it altogether; his person was to mine ... Taylor, for the accused, argued that 'there was no evidence of force or intent to use force, or that she resisted the prisoner, and therefore the prisoner could not be found guilty of the attempt' but Lush J concluded 'Yes, but if she was asleep, she is incapable of consent, and therefore it would be a rape (or attempted rape)'.

Mrs Mayers, being the married sister-in-law of the accused was likely to have been sufficiently cognizant of sexual matters to understand the nature of full penetration and that the complete act may not have taken place. Nevertheless the case is authority for the proposition that a sleeping victim is incapable of consent. Where intercourse commences during sleep but continues without objection upon awaking, the absence of consent is more difficult to assert. So in the sad case of *R v Page*,[19] on the trial of an indictment for rape:

> ... it appeared that the prisoner had commenced having connexion with the prosecutrix, his own daughter, a girl about thirteen years of age, while she was asleep, but that she awoke before it was at an end and made no resistance, until she saw that a third person was present watching her.

It was held that under such circumstances (and with an established sexual history between father and daughter) 'the jury would not be justified in finding the prisoner guilty of rape'. In this case, a child's passivity was sufficient to undermine the charge, demonstrating at the very least some cultural and legal ambivalence. Nevertheless the cases do not cast doubt on the contention that penetration can be initiated whilst the victim is asleep. In 1987 Hom noted (Hom (1987), p 1246):

> Some readers may consider it beyond the realm of credibility to believe that a man could engage in sexual intercourse with a woman before she awakens. Although rare, such occurrences have been reported in other cases.

In *State v Moorman* (1986) itself, a college student, 'in the hazy period between sleep and wakefulness ... dreamed of having sexual intercourse. The dream however, became a

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17 (1878) 14 Cox CC 114.
18 (1872) Cox CC vol XII (1871–74) 311. Again, note the euphemistic terms.
19 (1846) Cox CLC 133.

nightmarish reality when the woman awoke to find a man, a slight acquaintance, *flagrante delicto*' (Hom (1987), p 1246).

A notable aspect of the prosecutions for rape recorded in 19th century criminal cases is that, apart from the few dramatic cases already cited of men procuring intercourse by various forms of fraud or during sleep, many sickeningly mundane prosecutions seem to have involved young or handicapped children. So, in *R v Nicholls*[20] the prisoner 'was indicted for an assault to commit a rape on a girl under eight years of age ... There were also marks on the child's linen which made it doubtful whether the graver offence had not been completed'. In *R v Barratt*,[21] Robert Barratt was tried for a rape on Mary Redman, an idiot girl aged 14 who was blind, dumb and severely handicapped. *R v Woodhurst*[22] was an indictment for carnal knowledge and assault of the 10 year old daughter of the accused. The direction to the jury reviewed the issue of consent but concluded 'if the child submitted under the influence of terror, or because she felt herself in the power of the man, her father, there was no real consent'.

If consent could been an issue in crimes against such young children, little wonder that rape claims by ordinary women seem singularly rare; for this paradoxical reference to consent may be resolved by viewing it as involving an unspoken *presumption* of consent, as opposed to the modern ideal of establishing whether consent was real or, from diverse pressures, apparent. It would appear that the case of Woodhurst adverted to the negation of consent through terror because it involved a 10 year old child; such 'psychological' pressure has come to be recognised as a viable negating factor for adult women only latterly.

Conclusion

In criminal trials for rape, there is a clear motive for construing the evidence either to strengthen or undermine the case against the accused. It is the *raison d'etre* of prosecution and defence counsel, the very purpose of the theatre of law, to test the credibility of conflicting accounts. In the text *Tess of the d'Urbervilles* there exists an additional source of evidence to which the real-life courtroom cannot advert – the philosophically enlightened and reliably clairvoyant eye of the omniscient narrator. Those events which are obscured because unsayable in the Victorian text are made more transparent by judgments offered by the omniscient narrator. The voice vindicates Tess as an innocent who is consumed, first for her beauty and again for daring to hope that the absence of agency in her own sexual fate will preserve her from further harm. The plot confirms this view: Alec is a cad who admits full blame, her husband Angel Clare rejects her because of the mechanical fact of her lost maidenhood notwithstanding the blameless context of that loss.

Tess is painfully honest, loyal and trusting, the bearer of a sin 'not of her own seeking' (*Tess*, p 128). This being the case, any questions not wholly answered by the text should be examined with at least a suspension of judgment if not a degree of partiality for the victim clearly signalled by the text. Why then does Sutherland choose to present the case so roundly in the role of an avid defence counsel for Alec? Perhaps primarily he feels

20 (1847) Cox CLC 182.
21 (1873) Cox CLC 498.
22 (1870) Cox CLC 443.

challenged to construct the least automatic analysis in the pursuit of critical refinement. The process is fuelled by evidence of a change of emphasis in successive critical views – the 'seduction' of the 1890s becomes 'rape' in the 1960s. Yet this fails to take account not only of the clear message signalled by the text, but of the socio-legal context of that message. Whilst contemporary Victorian commentators predictably might have railed against a novel which sympathetically portrays the sexually injured Tess, the novel was ahead of its time in critiquing the double standards of a culture too ready to judge by superficial lights. The transcendent importance of preserving virginity as the emblem of unsullied property meant that women were divided into two basic groups determined not by the modern emphasis upon whether intercourse was consensual or not, but by whether anatomical invasion had occurred. The fact of such damage raised a *presumption* in the minds of 'respectable' souls – a kind of *res ipsa loquitur* which only the clearest mortal resistance could gainsay. This evaluation still obtains today. As Helena Kennedy explains (Kennedy (1993), p 123):

> The persistent cross-examination ploy of defence counsel is to deny that fear might paralyse the victim and to insist that a woman guarding her virtue would fight like a lioness. We are still haunted by powerful cultural images of what good women do in the face of ravishment. In a long literary tradition which begins with Livy and Ovid, Lucretia fights off her attacker and refuses to yield to his threats. The deed done, she takes her own life.

Such leonine vigilance is clearly expected by Sutherland in the sleeping Tess.[23]

Whilst Tess's peasant companions clearly understood that the protections vouchsafed to bourgeois females did not extend to them, writers of critical essays languished in the deluded certainties of middle class prejudice. It was believed that girls who found themselves in compromising situations at the very least contributed to, if not actively sought, their fate. Sutherland relies on the views of the Victorian critic Mrs Oliphant,[24] a literary critic who, as Sutherland must know, represented extreme sanctimony – the Mary Whitehouse of the 1800s. Lyndall Gordon calls Mrs Oliphant 'the foremost opponent of emancipation' (Gordon (1994), p 162). Not only did she oppose Hardy's work; in *Blackwoods Magazine* Mrs Oliphant dismissed *Jane Eyre* by Charlotte Bronte as a production of 'grossness', 'such grossness as could only be perpetrated by a woman' (Oliphant (writing in 1855)).

Tess herself was little more than a child at the time of the encounter; the text describes her bastard offspring as 'a child's child' (*Tess*, p 144). But this was at a time when childhood, in fact and law, was fleeting and sexual maturation all too easily implied a

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23 On the classical Greek background to rape and seduction, see Harris (1990), a scholarly examination of the claim that 'seduction' was a more serious offence than 'rape' in classical Athens: 'Euphiletus' explanation … is that while the rapist incurs the hatred of his victim, the seducer corrupts the very soul of the woman …' (p 370).

24 Sutherland ((1996), p 202) quotes Mrs Oliphant's assertion that:

> … we do not object to the defiant blazon of a Pure Woman, notwithstanding the early stain. But a Pure Woman is not betrayed into fine living and fine clothes as the mistress of her seducer by any stress of poverty or misery; and Tess was a skilled labourer, for whom it is very rare that nothing can be found to do. Here the elaborate and indignant plea for Vice, that is really Virtue, breaks down altogether …

Sutherland adding 'Morris and Oliphant take it for granted that Tess was "seduced" – that is, led astray, not violated or forced into sexual intercourse against her will …'.

guilty mind. Tess's sensual appeal and her downfall lie partly in that very combination of childish womanliness:

> Here was I thinking you a new-sprung child of nature; there were you, the belated seedling of an effete aristocracy (*Tess*, p 302),

rails her husband. Yet the evidence dispersed throughout the book suggests that Tess is the victim of her own sexual ignorance and innocence, that the encounter is unwanted but that in Victorian terms, surely 'The Woman Pays'.[25] This is a conclusion made available to any fair reader of the text, Victorian or otherwise. Sutherland's view that 'She who was seduced in 1892 is she who is raped in the permissive 1960s' (Sutherland (1996)) betrays a similarly strange inversion. Surely to 'modern' eyes a 'censorious' age would have recognised as 'rape' that which in a more 'permissive' age is dismissed as mere 'seduction'? On the other hand, if a 'permissive' age is that which 'permits' a hitherto unsayable yet justifiable plea of rape to surface, it is surely a permissiveness to be welcomed.

Like the judge for whom a woman victim's 'no' may really mean 'yes', Sutherland's inversion and ultimate melding of the terms 'seduction' and 'rape' is an expression of a dominant phallogocentrism. Yet, as Carol Smart explains:

> The concept of phallogocentrism is, however, not without its limitations.
>
> Basically the identification of a system of knowledge and logic based on binary meanings does not help us to go beyond this form of conceptualisation ... the law cannot accommodate the supposed ambiguity of a submission to sexual assault ... Hence, in law's domain the more that non-consent can be made to look like submission, the more it will be treated like consent (Smart (1990), pp 10–14).

The inability to go beyond such binary meanings, concluding that the textual ambiguity of Tess presents us with a polarised scenario could thus be almost forgiven, for it is after all merely what happens in that other trial of fact, the court of law. Almost that is, until we recall the disinterested yet omniscient evidence of the narrator, an ideal third party witness available only in fiction. The voice clearly identifies the sexual encounter as an act of 'appropriation' and 'ruthlessness', concepts incompatible with the presence of consent.

Summary

Professor John Sutherland assembles a critique of *Tess of the d'Urbervilles* based upon the premise that early readings of the text understood Tess to be largely the mistress of her own downfall; that it is only in recent years that the notion of Tess as overwhelmed 'victim' has emerged – 'She who was seduced in 1892 is she who was raped in the permissive 1960s' (Sutherland (1996)).

Juxtaposition of the text of *Tess* with Sutherland's gloss on the text reveals significantly contestable points, both as to the actual content of the text and Sutherland's rhetorical and deductive elaborations of it.

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25 *Tess of the d'Urbervilles* – 'Phase the Fifth – The Woman Pays' – title to the fifth section of the book.

At the heart of the debate lie the meanings ascribed to the words 'rape' and 'seduction' by commentators; each word carries cultural assumptions relating to the status and agency of female sexuality. Historical investigation reveals a complex background to the juristic gloss placed upon these cultural assumptions – both 'rape' and 'seduction' have complex legal histories, most notably in relation to the identification of women as property and the subsumption of any effective investigation of consent.

The text of *Tess* also provokes consideration of a particular point of law – that of cases concerning possible rape initiated upon a sleeping victim. Again, historical caselaw raises some discomfiting material.

The skewed vision of Tess as presented by Sutherland holds broader implications. The legal history of rape and seduction demonstrates a cultural ambivalence towards female victims of sexual exploitation, an ambivalence exhibited by Sutherland himself and still very much in evidence in modern day law. Sutherland's thesis – that the 'seduction' of the 1890s becomes 'rape' in the 'permissive' 1960s – reveals a strange cultural implosion. If the 1960s herald a new era of sexual freedom and conscience, with rape openly acknowledged as an event involving absent consent and sexual predation, this is surely a welcome event. Yet attaching the label 'permissive' suggests regret, even hostility – that with this age of alleged sexual freedom comes an unwanted licence in the empowerment of victims, an unfair portrayal of men as exploitative. The battle continues, not least in court.

The serious question posed by *Tess* remains unanswered because sexual equality in the forest, in the courtroom and in the text exists largely in the ideal rather than the real. The serious question raised by Sutherland's treatment of the text, and of the evidence, is how far masculine readings, in the name of plausible textual scholarship or plausible justice in the courtroom, continue to dominate and shape feminine experience. Until very recently, such skewing has occurred in relation to the treatment of the female accused in the law of homicide, and it is to this, with particular reference to the law of provocation, that we next turn.

PART II
TESS OF THE D'URBERVILLES AND THE LAW OF PROVOCATION

Introduction

It is no surprise to find that the most winning characters in Victorian novels experience little mercy once they carry out a desperate act resulting in the death of another. *Tess of the d'Urbervilles* is just such a case. Tess kills her seducer and her own execution is a foregone conclusion. Victorian law might well have been draconian in its disposition to such crime.[26] In one sense, the novel encourages the reader to accept this: there is no trial, no

26 'I believe it was Andrew Lang who put about the idea that she would not have been hanged. But a curious thing is that a Home Secretary informed me that he would have seen no reason to interfere with her sentence': Thomas Hardy, quoted in Martin Seymour-Smith, *Hardy* ((1994), p 434). The fate of Tess may also reflect Hardy's memory of a woman, Martha Brown, hanged for killing her husband as a result of his unfaithfulness; (Seymour-Smith (1994), p 33).

appeal and the text summarily marks the execution with the fatalistic words '"Justice" was done, and the President of the Immortals, in Aeschylean phrase, had ended his sport with Tess' (*Tess*, p 489). Yet, in another very real sense the novel screams 'injustice'! In reading *this* message, the lawyer-reader can derive an intriguing and profound lesson for present day criminal law; that in our obsession with the minutiae of doctrinal propriety we overlook the social construction of victims turned perpetrators and the concomitant complicity of doctrine. This is an issue of central importance to criminal jurisprudence and is most evident in the doctrine of provocation.

Recent academic commentary has focused upon the doctrine's allegedly unequal sympathies towards male and female perpetrators: the 'battered woman' responding to provocative behaviour with a 'slow burn' of anger being acknowledged with uncertainty.[27] *Tess of the d'Urbervilles* makes a prescient case not only for this expansion of the doctrine, overcoming the prior partiality of the doctrine and culture for certain 'criminals'; it also demands acknowledgement of the cultural production of *the crime*.

Reviewing the doctrine: the ghosts in the provocation machine

As with any legal doctrine, the law of provocation has evolved as the product of halting and historically determined conceptual influences and caselaw developments. The doctrine can be traced to a period of vastly different cultural experience and values from those which obtain today. In *DPP v Camplin*[28] Lord Diplock, referring back to *R v Hayward*,[29] noted:

> The human infirmity on which the law first took compassion in a violent age when men bore weapons for their own protection when going about their business appears to have been chance medley or a sudden falling out at which both parties had recourse to their weapons and fought on equal terms.

Two aspects of this early model of the provocative encounter have disappeared from modern doctrine – first that the law's indulgence in a show of compassion could be linked to the fact of an inherently lawless society – a 'violent age', when it was necessary to bear weapons for one's own protection. It may be presumed that with the advent of more effective legal constraints upon society, this link between social lawlessness and subjective justice became less evident.

The second element of the early model to which reference is no longer made is of a scenario where the parties 'fought on equal terms'. The notion of an essentially 'lawless' community which, whilst it fails to perform its protective function, will indulge the impulsive enterprise of its subject and the assumption of some degree of equality between the parties will be revisited.

Let it be noted at this point, however, that a degree of flexibility attached to the usual requirement of provocation by physical assault, where the accused had suffered the archetypal psychological trauma of encountering either his wife in the act of adultery, or his son being sodomised (the overtly patriarchal bias is later modified, at least in part,

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27 Articles are many and include McColgan (1993); Nicolson (1995); Yeo (1997).

28 [1978] AC 705, p 713.

29 (1833) 6 C & P 157.

according to *dicta* in *Holmes v DPP*).[30] A more objective release from the physical assault component was of course achieved in the enactment of s 3 of the Homicide Act 1957,[31] recognising that acts and/or words could be provocative. The present law requires, firstly, that the loss of self-control must be a sudden and temporary response to the provocation rendering the accused for the moment not master of his mind. However, 'although it is established that a temporary and sudden loss of self-control arising from an act of provocation is essential, it is less clear to what extent previous acts of provocation are admissible' (Archbold, in Richardson (1998), p 1467). With regard to phenomena such as 'slow burn' and 'battered women's syndrome', arguably it should be the case that 'a jury might more easily find that there is a sudden loss of self-control triggered even by a minor incident if the defendant had endured abuse over a period, on a last-straw basis'.[32] Secondly, the jury must decide whether the provocation was enough to make a reasonable man respond in the way that the accused responded, but since *DPP v Camplin* the 'reasonable man' has evolved into a multi-dimensional creature who may plead that his susceptibility to the provocation was heightened by possessing 'permanent characteristics' which affected the gravity of the provocation to him. Again, it is not entirely clear whether 'battered woman syndrome' can acquire quite the same pedigree as other 'characteristics'. Nor is it as likely as some other traits to fulfil the erstwhile norm that there be a direct link between the provocative conduct and the characteristic.[33] As Chapter 1 suggests, the whole notion of the reasonable man has been undermined by the constant encroachment of credible – or 'reasonable' – extensions, elaborations and exceptions, so that by the year 2000 the concept is demonstrably undermined. The abandonment of the 'reasonable' manikin may have been driven by its diminishing intelligibility for practical use; such abandonment bears deep and complex theoretical ramifications. The implications for associated doctrinal elements remain unclear. The 'relationship' (if it may be so called) between the reasonable man and the female accused – in her putative claims to reasonable womanhood – is as troubled as that between the reasonable man and the female victim; in short, more troubled than his relation to himself. As will be seen, this 'legal' history of the world of reasonableness is informed by juxtaposition with a more panoramic literary and cultural review.

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30 [1946] AC 588.

31 See summary 'The genesis of s 3 of the Homicide Act 1957' in *Luc Thiet Thuan v R* [1996] 2 All ER 1033, p 1049.

32 *R v Thornton (No 2)* [1996] 2 All ER 1023C–D (Lord Taylor CJ).

33 The issue of 'characteristics' is complex. 'Legitimate' characteristics may be derived from *DPP v Camplin* [1978] AC 705, where examples included 'the fact that the accused was a dwarf, or of a particular colour or ethnic origin, or impotent, or suffering form an abscess on the cheek when struck, or undergoing menstruation or menopause. It should be stressed that the relevance of such characteristics depends on whether they would affect the gravity of the provocation' – cited in Archbold ((1998), p 1468). I use the phrase 'erstwhile norm' because the Privy Council decision in *Luc Thien Thuan v R* [1996] 2 All ER 1033 has been cited as authority for the proposition that 'it is not necessary in order to establish the defence of provocation for the provocation to have been directed at the relevant characteristic of the defendant' (*per* Lord Goff, p 1047). See also Yeo ((1997), p 442). Yet the example given in *Luc Thien Thuan*, 'previous events mislead the defendant into believing that an innocent remark by the deceased was so directed when in fact it was not' is an extremely tenuous and therefore potentially unreliable suspension of the link.

Tess of the d'Urbervilles, 'the facts' and three trial-narratives

Tess of the d'Urbervilles is a pertinent text with which to critique aspects of the doctrine of provocation primarily because it *upbraids* the law: in the case of Tess, the execution of justice seems very like the execution of innocence. Despite its fictional context, this reproach appears valid, plausible and worthy of exploration and because of its fictional context the challenges to doctrine are conceived and conveyed anew. Secondly, as with novel caselaw itself, the 'facts' of *Tess* are similar to and different from existing precedents, providing new points of comparison. Aligning the 'facts' of *Tess's* case with three successive trial-narratives allows doctrinal models to be tested against these facts for their degree of 'fit'.

R v Durbeyfield:[34] the facts

A young girl, Tess Durbeyfield, ignorant and innocent of sexual matters, is raped/seduced[35] by Alec d'Urberville, a local member of the *nouveau riche*. She gives birth to an illegitimate child, who subsequently dies. Later she falls in love, and marries Angel Clare, a pleasant young man. On their wedding night, he confesses a youthful peccadillo. She in turn feels permitted to disclose her past, but her husband's idealisation of her purity means that he cannot accept these facts. He insists that they part. The young woman spends some time in hardship and poverty, but feels unable to appeal to her estranged husband. Destitute, convinced that her husband is lost to her and careless of her fate, she allows the seducer to establish her as his mistress, partly in order to secure aid for her impoverished family. Meanwhile her husband has relented. He returns to see his wife. Desperate to regain the love of her husband, and in an attempt to negate the past, she kills her seducer. Husband and wife are reunited. After a brief period as fugitives, the young woman is captured, tried and hanged for the murder.

Trial-narrative 1

A contemporaneous narrative gloss of these facts could read as follows:

> The accused and the deceased shared a long established history. Whilst still a young girl, the accused had suffered an assault of the grossest kind at the hands of the deceased. As a result of this assault, her fortunes were sadly affected; she was rejected by her lawful husband and suffered protracted penury. Throughout this time, the deceased pursued her, and eventually she succumbed to his entreaties that she live with him as his mistress. Soon afterwards, her husband returned, it would appear with the intention of effecting a reconciliation. Believing this to be impossible under the circumstances, and taunted by the words of the deceased, the accused stabbed her victim, killing him.

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34 Since there is no trial scene in the novel, the case is never referred to by name, however it would have been '*R v Durbeyfield*' (or, under her married name, '*R v Clare*'). Tess belongs to an impoverished branch of the d'Urberville family; her surname has become debased to Durbeyfield. This clothes a purification, however, for d'Urberville, with its connotations of Norman urban/town, has acquired the pastorally cleansing 'field' (I would like to thank my daughter Tamzin Williams, for pointing this out). This beautifully underscores the symbolism in the novel and in Tess's character, whom Hardy was at pains to subtitle 'A Pure Woman'.

35 Two points in the text of Tess suggest that the encounter was closer to the definition of rape: one refers to Tess's ignorance of sexual matters (p 131), the other to local belief on the matter (p 140).

It would not appear that the accused was provoked into committing this murderous act. Although she had long ago suffered grievously at the hands of the deceased, it seems that he treated her thereafter with solicitude. The fact that the accused agreed to live with the deceased as man and wife bears this out. Words were the only provocation offered to the accused on the fateful day. But mere words cannot amount to such provocation that we could say the accused acted impulsively under the influence of 'hot blood'. Nor can it be said that it was necessary to deliver such fateful blows in self-defence – she had not been put in fear for her life by her victim. Thus, it would seem that the accused was entirely in control of her faculties, and the only conclusion to be drawn is that she killed her victim 'in cold blood'.

Trial-narrative 2

A more modern doctrinal gloss might read:

> The accused and the deceased shared a long established history. Whilst still a young girl, the accused had suffered an assault of the grossest kind at the hands of the deceased. As a result of this assault, her fortunes were sadly affected; she was rejected by her lawful husband, and suffered protracted penury. Throughout this time, the deceased pursued her, and eventually she succumbed to his entreaties to live with him as his mistress. Soon afterwards, her husband returned, it would appear with the intention of effecting a reconciliation. Believing that this would be impossible under the circumstances and taunted by the words of the deceased, the accused stabbed her victim, killing him.
>
> It may be that the accused was provoked into committing this murderous act. Words or acts, or both together, may constitute provocative behaviour, which must be judged according to the standard of the reasonable man. In addition, if such words as were spoken by the deceased could be taken to have been provocative, the requisite degree of temporal immediacy – between the provocation and the response – was also present; supporting the view that the accused acted 'in hot blood' rather than with premeditation. However, a further obstacle must be surmounted before the question of provocation can be admitted. Since the degree of provocation – words – is disproportionate to the response of fatal assault, the accused must prove that she laboured under some permanent characteristic, and that the provocative words were in some way directed at that very characteristic, so affecting the gravity of the provocation to her.
>
> Now in the accused Tess's case, the provocative words were aimed at the very subject upon which she was most sensitive: her estranged husband. Yet can it be said that this constitutes the type of 'characteristic' formulated above? The kinds of characteristic which could fulfil the model certainly do not guarantee a positive outcome for Tess. Tess did not suffer from a permanent, abnormal characteristic, such as deformity or impotence. Her sensitivity regarding her husband was long standing, but would be unlikely to be classed as 'a permanent characteristic which set the accused apart from the ordinary person in the community'.[36]
>
> If that instant provocation by words is insufficient to afford a defence, what of the wider picture? It could be argued that an incident cannot be regarded in isolation; the accused, Tess, had at a tender age suffered an assault at the hands of the deceased which had damaged her fortunes. On the other hand, aside from this one distant incident, the deceased had, albeit in a somewhat proprietorial manner, treated her with concern. Having killed the deceased the accused stated to her husband:

36 *R v Newell* (1980) 71 Cr App R 331.

> I owed it to you, and to myself, Angel. I feared long ago, when I struck him on the mouth with my glove, that I might do it some day for the trap he set me in my simple youth, and his wrong to you through me (*Tess*, p 474).

Although the accused herself refers to the original injury inflicted upon her by the deceased – 'the trap he set me in my simple youth' – as directly related to her action, her later reconciliation with him, and the passage of time, displace the claim that this early fault could still be pleaded as an operating and substantial factor such as to constitute provocation. There had been time for 'a cooling of the blood', and indeed the words 'I owed it to you, and to myself, Angel' suggest not only a complete lack of remorse on the part of the accused, but an element of retribution indicative of premeditation.

Trial-narrative 3

A third and final account of the facts in the case of *R v Durbeyfield* might be along the following lines:

> The accused and the deceased shared a long established history. Whilst still a young girl, the accused had suffered an assault of the grossest kind at the hands of the deceased. As a result of this assault, and despite her best efforts to rebuild her life, the accused suffered what may be termed a 'social death'. Society took little interest in her intrinsic innocence, looking only to the *physical* effect of the encounter; the destruction of her virginity rendering her a social outcast. Upon discovery of this fact, that the man whom she truly loved and who seemed to offer her salvation, rejected and abandoned her. Thus, following her social death, the accused became subject to such alienation and privation as to constitute a psychological death. Upon his return, her husband sensed this:
>
> > His original Tess had spiritually ceased to recognise the body before him as hers – allowing it to drift, like a corpse upon the current, in a direction disassociated from its living will (*Tess*, p 467).

The 'reconciliation' with the deceased, her former assailant, is thus explicable: the accused was by this time indifferent to her fate. In addition, the evidence demonstrates that any remaining concern for her own well being was sacrificed to altruism – she acquiesced in the deceased's offer to protect her destitute family, which was made on condition that she submit to his sexual demands.

The return of her estranged husband triggered a form of reawakening in the accused, bringing the whole series of events, rape, abandonment, and indifference to self into a single cataclysmic and unified focus. Throughout, the rape had remained central to her destiny, and to the re-ordered logic imposed upon her by social and psychological death:

> I feared that I might do it one day for the trap he set me in the simple youth, and his wrong to you through me (*Tess*, p 474).

Indeed, this process of re-ordering is such that the act of murder is cleansing and transformative:

> I thought as I ran along that you would be sure to forgive me now that I have done that. It came to me as a shining light that I should get you back that way (*Tess*, p 474).

Such fervid investment in the act of killing as a restorative underscores an additional fact: that for one who has already suffered social and psychological death, the prospect of physical, 'legal' (where murder is a capital offence) death is not even a consideration.

It will be apparent to the reader that the first of these trial-narratives approximates to the doctrinal position which obtained in law in Hardy's day. Thus Hardy was quite correct in his assessment that the 'trial' of Tess would have been a mere formality; her execution a foregone conclusion. The second narrative approximates to the present state of law, and though perhaps less draconian than its forbear by no means offers relief – or justice – to the idealised victim, Tess. Yet the kernel of development in the second narrative – derived from modern doctrinal developments – bring this 'trial' a little closer to the possibility of justice championed by the third trial-narrative.

This third version of course approximates to Hardy's own version of events. Curiously, criminal law takes little cognizance of the notion of 'former good character'; when dealing with an apparently deliberate act of killing, the mild, abused housewife is as likely as Tess to be classed indiscriminately with the hardened malevolent. Yet the hypothetical 'case' put forward in *Tess* leads one to question and interrogate criminal law's blinkered focus upon factors which, whilst attempting to create a reliable formula for identifying the truly malevolent killing, is both austere and artificial. Within the notion of 'intention' lies a maelstrom of disordered rationales which disrupt the simple division between intentional and unintentional killing. If Tess has ceased to value her *own* life to the point of indifference to her fate, and to capital punishment, becoming mostly a conduit for some process of reparation, little wonder that the life of another may be similarly instrumental. Arguably the almost epiphanic reconstruction of the killing, negating her own and another's life, is akin to the dystopic visionary zeal of the terrorist. Yet whilst it is clear that terrorist acts – designed as they are to achieve a political objective – reflect an investment by the individual in a minority ideological agenda which the State cannot allow, Tess's dystopic rationale has been forced upon her both by society and by her victim and, unlike the terrorist, her action is endorsed by the 'society' of readers who are privy to her story: Tess has fulfilled an imperative which derives from an unspoken 'natural' law.

Similarly the division between killing 'in cold blood' and 'in hot blood' perpetuates, rather naively, a mediaeval mythology of humours both capricious and unscientific. Tess's action can be described neither as 'cold blooded' nor 'hot blooded'. She is best described as devoid of blood – 'a corpse upon the current'.[37]

Narratives of doctrine, or indoctrination?

Given that a lawyer may conclude that, whilst sympathetic to the disruptive individual injustice experienced by Tess, priority must be accorded to the maintenance of legal consistency, there is still room for exploration of how this disruption occurs. For undoubtedly, Tess's narrative pleads the legitimacy of her action.

A similar conclusion may be retrieved from some of the more disturbing modern homicide cases. In caselaw, however, any attempt to critique freely the dislocation (between the sense that the act of the accused is in some way legitimate, and the law's

37 The law's reference to 'hot blood' and 'cold blood' is used with full technical gravitas as a ready indication of whether the accused has formed a malicious intention towards the victim. The terminology derives from a mediaeval and Shakespearean ordering of bodily 'humours'; 'and the heat of blood kindled by ire was never cooled, till the blow was given, *et sic de similibus*': Coke, E, 'Institutes of the Laws of England', vol iii, 50, quoted in Russell (1958).

insistence that the intrinsic illegitimacy of a mortal act can only be displaced by demonstrating that the facts conform to doctrine) is subject to two constraints. First, the lawyer will be 'locked in' to the internal logic of that doctrine, and any attempt to extend it in order to accommodate a different viewpoint must honour the existing doctrinal fabric, as demanded by precedent. Secondly, the very representation of the facts within the fabric of a legal trial or report invokes a subtle process of anaesthesia. Where fiction is free to represent the dimensions of experience and give due recognition to the impact of seemingly trivial incidents, the detached voice of law acknowledges and locates the experience of the accused within a preordained forensic narrative. Thus even when, in reading a law report, the sympathetic reader stumbles upon the more disturbing aspects of the accused's narrative and is disturbed by their poignancy, she is alternatively *seduced* and *harassed* into distancing herself from that reaction. The real life drama, trauma or tragedy of the accused is recorded or trapped within the bricolage of doctrine, like a fly in amber. This effect is enhanced in that the 'objective' narrative voice of law instils the belief that both the recitation of facts, and to a large extent, the legal gloss, comes to the reader unmediated by subjective interference. As Weisberg ((1992), p 230) says of *The Brothers Karamazov*:

> The erroneous conviction of Dmitri is a critique par excellence of the way the law twists reality into a false codified form. Yet the enormity of the error can only be comprehended in light of the full narration of the events as they occurred.

In addition, lawyers must employ narrative techniques particular to their trade, which choreograph polarised versions of the events. Goodwin identifies one such technique: the constitution of what she terms 'kernel' or key events. Any two opposing lawyers will establish different and competing kernel and satellite events (Goodwin (1994), p 223). In addition, both will be locked into the doctrinal drive which insists that those events which *may* be disputed over as forming either kernels or satellites, take precedence over, or efface other elements which do not conform to the doctrinal model; elements which cannot qualify as either kernels or satellites. In present law, for example, similar fact cases to that of Tess would centre upon competing views which either posit a (prosecution) kernel which asserts as central the requirement that reaction to provocation must be immediate, and the (defence) kernel that provocation may be cumulative. Yet it would be illegitimate for either party to suggest either that the provocation might be purely cumulative with no final provocative event inducing the fatal encounter, or that such a final event could be valid currency in the provocation stakes if the constraints of legal doctrine render it arbitrary or trivial.

Goodwin also identifies another narrative device which is pivotal to the relative potency ascribed to events. This is the distinction between 'real' time (the time that the events take to happen) and 'narrational' time:

> As narrators, lawyers strategically manipulate the potential disparity between these types of times to foreground their own choice of kernel events, and to omit details that threaten this kernel status (Goodwin (1994), p 224).

In caselaw, 'real' time is apparently represented objectively, supported by a chronology of dates and events. Yet as the cumulative events – and provocation – are contained within this chronology, they are necessarily compressed. It may be argued pragmatically, that an entire and exhaustive narration of each of these events could not be sustained by trial

hearings or documentation and to give equal weight to events which may be viewed as largely historical and therefore contextual would be to leave our natural ordering of chronology in disarray. Yet this undoubtedly feeds the assumption that the mere passage of time may dilute or eradicate an 'insult' to the accused. This notion of the psyche perhaps borrows from the physiology of the body – mere time may heal the most extensive wound, and then only violent force will succeed in reopening it.

Free to give due cognizance to the subjective experience of such 'kernel' and 'satellite' events, the textual account in *Tess* is very different from the accounts which we have seen in law. Legal orthodoxy would focus upon criminal events – juristic narration would include a detailed 'kernel' enquiry of the circumstances surrounding the killing. A defence might try to claim that the rape/seduction of Tess is also 'kernel', or at the very least 'satellite', whilst the prosecution would relegate the rape as at most a distant satellite. Interestingly, the text of *Tess* suggests a completely different path. The rape is treated fleetingly; indeed we are reassured that in time Tess 'recovers' from the experience – it is the *social* interdiction which is so damaging. Likewise, the killing is treated fleetingly and with scant detail. Thus two potentially momentous 'legal' events remain tenuous even as 'satellites'.

Which event *is* given 'kernel' treatment in the text, given that a rape and murder can be so readily truncated? One answer is the enforced separation from Angel, which is given a notably 'legalistic' frame. This separation scene occurs approximately halfway through the book – roughly midway between the rape and the killing. The preceding passages and the scene itself minutely record the complex process of alienation between Tess and Angel as the 'social chasm' created by Tess's impurity begins to gape. Angel declares that they must separate – 'until I come to you it will be better that you should not try to come to me'; and that this is prescriptive is confirmed by its classification as a decree – 'the severity of the decree seemed deadly to Tess'. With a profound recognition of the interplay of power, resistance and submission at such times, the exchange conflates elements of the 'volitional' civil pact and a punitive criminal judgement. Tess submits to Angel's severe decree; although mentally she questions it, she can no longer put her case – 'she could contest the point with him no further'. Thereafter, the conditions of the separation are clarified: Tess echoes Angel's terms in true performative style. This culminates in a final conflation of the civil and criminal when simultaneously Tess volunteers her consent to the pact, acknowledges its punitive force (and Angel's arrogation of power as judge) and enters a plea for mercy:

> I agree to the conditions, Angel; because you know best what my punishment ought to be; only – only – don't make it more than I can bear![38]

Tess begins a downward spiral which will lead to her eventual destruction. The fictional narrative may achieve what juristic orthodoxies cannot: that such an event is truly 'kernel', and contains psychological and linguistic subtleties indicating a unilateral arrogation of power which may have far reaching consequences. This arrogation of power, authority and judgement can only take place, however, because cultural values support the process: in one sense Angel is simply the creature of the prevailing but skewed cultural values: the transmitter of the social edict.

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38 All of these related quotations appear in *Tess*, p 324.

(Narrating) the socio-legal nexus

Thus in reconstructing the case of *R v Durbeyfield*, and in keeping with the realist genre, the fictive narrative is less subject to constraints. Firstly, kernel and satellite events may be arranged purely according to the potency with which they impinge upon the subject. According to this account, the fact of rape, bearing an illegitimate child, even social ignominy may be tolerated with a degree of philosophical acceptance until another event forces the realisation that the destruction of Tess's virginity *dictates* her subsequent fate. Angel Clare, Tess's husband, finds the fact distasteful and intolerable; it is a disability which effaces her very identity – 'You were one person; now you are another' (*Tess*, p 298). However eccentric or uncharitable such a reaction may seem to present eyes, it is clearly quite consistent with former cultural values. Legal doctrine would have some difficulty in encompassing this causal link between the rape and its elevation to the status of an irrevocable event since the elevation is largely dependent upon the chance involvement of a third party.[39] Yet this depiction is faithful to a factor only obliquely recognised by the law – that the potency of a provocation (if we can so regard the rape) is as much shaped by culture and custom. 'Impulsive' 'unpremeditated' behaviour is thus not merely descriptive of a human reaction, refereed by the standard of the reasonable man, it is acculturated, predetermined by a social register of insults.

Hardy's potent critique of legal mores recognises the interplay between cultural values and legal blind spots. More importantly it exemplifies the fact that when society denies both the crime and the victim, this will *relocate the power of the provocation*. Although such phenomena can be anatomised in fiction, the intimacy of the relationship between social and legal doctrines would, even in modern times hamper such dispassionate legal enquiry. The novelist's contribution to jurisprudence will almost inevitably be overlooked. Yet ironically, modern developments in the doctrine of provocation indicate a slow advance towards the insights offered by Hardy. Clothing the reasonable man with characteristics which make him more vulnerable to the particular provocation may give some recognition to the accused person's entrapment between punitive social values and the peculiar power of the provocation. Recognising that provocation may have a cumulative element brings legal doctrine a little closer to addressing the injustice suffered by Tess.

Natural law theory supposes that laws enacted for the well-being of any society extends and formalises fundamental values originating in 'natural' law. A primary example is the prohibition against any killing which is unjustified according to the value system of the community. Yet *Tess* reminds us that, though we may not be able to locate a response within doctrinal boundaries, as 'self-defence', or classical 'provocation', for example, nevertheless there may be justification for the killing amongst the community of readers who act as proxies for the temporarily blinkered community of citizens. The fictive model reasserts the primacy of fundamental values.

A mode of narrative disruption is adopted in the fabric of the story of Tess, in order to highlight the interplay between 'social' and 'juristic' values. The text is littered with ironic, and inverted, references to 'natural law'. So, although there is clear recognition that the act of rape is one of violation, which could, if detected, have invoked criminal

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39 See *Blackstone's Criminal Practice* ((1997), pp 108–09).

sanctions, it is also the fulfilment of a retributive ancestral drive, a retribution supported by Biblical doctrine.[40] And, though such blind retribution would be 'scorned by average human nature', yet in Tess's locality (the world of peasantry) such misfortune would be accepted fatalistically – 'it was to be'. Thus any sense of outrage remains unchannelled – no law, secular, natural or divine is brought to Tess's aid. Yet, it is emphasised to the reader that the event opens an immeasurable social chasm in Tess's life. Tess herself (in common with rape victims through the ages) suffers from feelings of confusion and guilt about her impurity, feelings which remain unsolved by popular religious tenets. On seeing the mutated slogan 'THOU, DAMNATION, SLUMBERETH, NOT', Tess trembles asking 'suppose your sin was not of your own seeking?'; and receives the reply 'I cannot split hairs on that burning query' (*Tess*, p 128) Tess's husband invokes 'natural' biological law to refute the marriage – that her rapist is Tess's 'husband in nature'. Tess becomes burdened with the fear that this is the case, whilst Alex (her rapist/seducer) wishes to marry her as 'sanctification for us both'. Thus in a dreadful inversion of the notion of natural law, the laws of nature and divinity are invoked to legitimate the violation of Tess, who later cries 'I shall not cry out. Once victim always victim – that's the law' (*Tess*, p 411).

Such instances demonstrate the 'skewing' of the concept of law as it is experienced by the subject – 'natural' law is cruelly unnatural; effectively severed from the notion of justice – a vision unsayable within any orthodox legal arena.

Sisters in law

We noted that the second 'trial-narrative' reflects the present English law of provocation. The provocation may be partly cumulative but must also have an 'immediate' component, temporally proximate to the response; the accused's susceptibility to a disproportionately mild provocation must be due to a causal link between the provocation and some permanent and odd aspect of his or her personality.

This awkwardly tailored doctrinal garment is forced about the frame of the accused. If it proves to be ill-fitting, it is confiscated: the fault must lie with the contours of the accused rather than law's measuring skills. Where there is a firm indication of guilt, the confiscation justifiably may be outright. On the other hand, there may be subliminal uncertainty as to guilt: the law may suffer residual anxieties about the accused's juridical nakedness. This is unlikely to invoke any major redrafting of the design; only recourse to a temporary back-buttoned institutional shift, for example the lateral skip to a doctrine such as diminished responsibility.

Thus in the case of *R v Ahluwalia*[41] the accused, an Asian woman, had set fire to and killed her husband. She had suffered years of physical and mental abuse at his hands, including the infliction of various injuries, which did not abate when she was pregnant. In addition he taunted her with his infidelity. On the night that the accused fatally attacked her husband, an argument took place, during which the deceased demanded money, said he would beat her, stated that he was leaving her (to live with his girlfriend)

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40 'Though to visit the sins of the fathers upon the children may be a morality good enough for divinities, it is scorned by average human nature; and it therefore does not mend the matter' (*Tess*, p 119).

41 [1992] 4 All ER 889.

and threatened to burn her face with a hot iron. Some hours later, in the night, the accused got out of bed. Carefully she poured petrol (which she had bought some days previously with a view to using it on the deceased) into a bucket, carried it to his room, and set fire to him.

From a doctrinal viewpoint, the case presents clear difficulties for the defence. Firstly, although there had been a cumulative provocation, the final encounter was less severe than those recorded previously. In addition there was a delay of some hours between the final encounter and the response. More damagingly, the accused's purchase of petrol and caustic soda some days before created a clear implication of the formation of intention, of malice aforethought. All of these factors tended to displace any assertion of a sudden and temporary loss of self-control. Finally, it was difficult to identify a characteristic in the accused which would fulfil the doctrinal formula: one which was permanent, setting her apart from the ordinary run of society, and the focus of provocative remarks. Indeed at first instance the judge's attempts to make the facts fit the doctrine on this point led to his rather unilluminating direction that 'the defence of provocation was only available to the accused if there had been a sudden and temporary loss of self-control on her part as the result of acts which would have caused a reasonable person *having her characteristics as a married Asian woman* to lose her self-control'.[42]

On appeal, the factual lack of 'fit' with the 'sudden and temporary loss of self-control' model was revised by defence counsel in the light of evidence of 'battered woman syndrome'. It was suggested that the syndrome modified reactions to violent treatment, so that the response to the final acts or words could be exemplified by a 'slow burn' reaction, rather than an immediate loss of self-control. In addition it was admitted that the syndrome *might* have fulfilled the criteria for a doctrinally 'legitimate' characteristic.[43] In the alternative, it was claimed that a more suitable plea might have been that of 'diminished responsibility', a plea which was subsequently accepted at retrial.

Like Tess, Mrs Ahluwalia was a weak candidate for the protection of the defence of provocation, even though the second narrative model of the doctrine demonstrates a considerably more progressive and liberal design than the first. With such facts might we be justified in feeling a sense of disquiet at a retreat into diminished responsibility doctrine, with its attendant implication of mental instability in an accused who has otherwise functioned as a loving mother and a dutiful wife, just as we experience disquiet at Tess's mandatory execution? This disquiet may spring from many linked aspects; the historical association between the doctrines of provocation and self-defence,[44] the hypothesis that the defence of provocation 'functions as a partial justification rather than a partial excuse' (McAuley (1987), p 133). Such justification may arguably involve a present response to a distant wrongdoing which is nevertheless still potent, an appreciation that the margins of doctrine may overlook pertinent factors, such as the previous good character of the accused or her subjection to the mesmeric malevolent power games of her victim, the unknown spectrum in states of mind between the benign and the malicious.[45]

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42 *R v Ahluwalia* [1992] 4 All ER 889, p 897 (emphasis added).

43 In *R v Hobson* [1998] 1 Cr App R 31, a retrial was ordered on the basis that it was a matter of significance that 'battered women's syndrome' was not part of the British Classification of Diseases until 1994, two years after the trial of the appellant.

44 See McColgan (1993).

45 See McAuley (1987), p 133.

Tess, we may remember, was subtitled by her creator as a 'pure woman', an assertion meant to be more morally than physically descriptive. Mrs Ahluwalia too tried her hardest to tolerate her invidious position, like Tess modifying her behaviour and her identity to her circumstances. From the anaesthetised account of her story created by law, which characterises Mrs Ahluwalia as 'the accused', 'the appellant', the one who exhibits perhaps 'premeditation', or 'diminished responsibility' – some narrative details survive, disturbing echoes between the 'case' of Tess and that of *R v Ahluwalia* (1992). Consider two such echoes:

> Deepak, if you come back I promise you – I won't touch black coffee again, I won't go town every week, I won't eat green chilli, I ready to leave Chandikah and all my friends, I won't go near Der Goodie Mohan's house again. Even I am not going to attend Bully's wedding, I (will) eat too much or all the time so I can get fat, I won't laugh if you don't like, I won't dye my hair ever, I don't go to my neighbour's house, I won't ask you for any help ... (Note from Mrs Ahluwalia to her husband quoted in *R v Ahluwalia* [1992] All ER 889, p 892.)

> I must cry to you in my trouble – I have no-one else ... I think I must die if you do not come soon or tell me to come to you ... Please, please not to be just, only a little kind to me! ... if you would come I could die in your arms! I would be well content to do that if so be you had forgiven me! ... If you will send me one little line and say *I am coming soon*, I will bide on, Angel, O so cheerfully! ... Think how it do hurt my heart not to see you ever, ever! Ah, if I could only make your dear heart ache one little minute of each day as mine does every day and all day long, it might lead you to show pity to your poor lonely one ... I would be content, ay, glad, to live with you as your servant, if I may not as your wife; so that I could only be near you, and get glimpses of you, and think of you as mine ... (Letter from Tess to her husband, *Tess*, p 456.)

> But he had a vague consciousness of one thing, though it was not clear to him till later; that his original Tess had spiritually ceased to recognise the body before him as hers – allowing it to drift, like a corpse upon the current, in a direction dissociated from its living will. (Description of Tess, shortly before her fatal attack on Alec d'Urberville, *Tess*, p 467.)

> Other neighbours rushed to the house. They found the door locked and saw the appellant standing at a ground-floor window clutching her son, just staring and looking calm. They shouted to her to get out of the house. She opened a window and said 'I am waiting for my husband' and closed the window again. She was prevailed upon to hand the child out and later emerged herself. She stood staring at the window with a glazed expression. (Description of Mrs Ahluwalia, immediately after her fatal attack on Mr Ahluwalia, *R v Ahluwalia* [1992] All ER 889, p 893.)

Conclusion

The correspondence between these two pairs of quotations reflect a state of depersonalisation, a dissociation[46] of self in the wake of intractable emotional brutality.

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46 A 'dissociated state' was referred to in *R v Thornton (No 2)* [1996] 2 All ER 1023, p 1031. Dissociation is defined in Sainsbury and Lambeth ((1988), p 66) as 'a partial repression wherein a portion of the personality, intolerable to conscious awareness ... is split off ... Emotions too difficult to bear may be split off and not felt, even though the person remembers the event ...'. Moreover, 'the requirement of loss of self-control seems unnecessarily harnessed to a notion of psychological determinism, which may do descriptive violence to those mental processes which result in such a loss': Smith and Wilson (1993).

Both women have been failed by society – for them effectively a 'lawless' society in which their entrapment is made absolute by the absence of any conduit for the recognition of their sufferings: the Asian community closed within the concrete isolation that is suburban Crawley meets the universal Victorian community of double standards. Whilst early doctrine may have attended to 'chance medley' where the parties 'met on equal terms' such victims suffer its inverse, a sustained assault in which parity is absent and instant response impossible. It would be tempting to relegate such cases to the less stringent realm of 'diminished responsibility' – indeed a 'dissociative state' may well fulfil the description. Yet there are two objections to such a course. First, it seems anathematous to classify them as suffering from such 'abnormality of mind' as 'substantially impaired ... mental responsibility' when they have in all other respects robustly maintained a mental equilibrium in the face of considerable odds. Secondly, it rather unfairly sets them on record as 'diminished': as the marked, albeit pathetic creatures of their own decline. Provocation doctrine at least records, by its very name, the Pyrrhic decline that was *shared*, both by perpetrator and victim. There is a strong moral foundation to linking the doctrine with the notion of 'partial justification' rather than 'partial excuse': to a very real extent the victim has spurred his own fate. McAuley locates the orthodox position:

> Since provocation normally takes the form of an assault by the victim on the offender, the question of gravity can usually be determined objectively, without reference to the defendant's personal characteristics. The latter only become relevant when there is no basis on which a purely objective judgement of gravity can be made, in other words, in the relatively rare cases *in which the victim's conduct is prima facie too slight to provide even a partial justification for the defendant's violent outburst.*[47]

McAuley's analysis forms part of a larger discussion upon the moral basis of the defence of provocation. If, as he argues, the defence 'functions as a partial justification ... a denial that the defendant's actions were entirely wrongful in the first place ... because of the untoward conduct of his victim' (McAuley (1987), p 139), surely it may further be asserted that a 'characteristic' which was *created* by the victim's conduct should have the soundest moral pedigree.

Law's mechanistic vision of provocation, with sudden and temporary loss of self-control as a co-requisite to proximate provocative behaviour brings us no nearer to understanding either the spectrum of moral imperatives between reason and reaction, nor to exploring the nature of the 'numbed core' which the 'hot blood' model assumes. Webster ((1996), p 496) explains that 'at the very heart of the historical concept of reason, we find nothing concealed other than the view of human psychology which is central to creationist theory; we find what should perhaps be known as "beast-angel dualism". According to this view, the purpose of reason is not to accommodate or understand or explain human nature. It is to control or subjugate the more unruly aspects of it – or even to deny or negate them'. Undoubtedly, a primary purpose of individual and doctrinal 'reason' is and has been, to control and subjugate the more unruly aspects of human nature. Yet from an initial demand that the instantaneous response be to physical assault, law negotiated a quaint diversion on behalf of the cuckolded husband; the outraged

47 McAuley (1987) (emphasis added).

father of the sodomised son. Words alone have become sufficient grounds for provocation, but the ennobled vision of the wronged hero responding 'in hot blood' maintains his spectral presence.

In one modern case, where an outraged father was prevented, by geographical distance, from demonstrating a sudden loss of self-control, there was a glimmer of recognition for a more protracted 'numbed core'. John Dickie Spellacie Baillie,[48] the appellant, who had three teenage sons, was told by his youngest son that he had been threatened by a man who was another son's supplier of drugs. The appellant, armed with a sawn-off shotgun and a cut-throat razor, went to the supplier's house, inflicted injuries with the razor, pursued the supplier from the house, fired the shotgun, and killed him. At first instance, the judge directed the jury on the issue of provocation, stating:

> If one takes evidence that this defendant was told by one of his sons of the most recent threat by the deceased, certainly to the sons, what then happens on any view of the evidence is a series of events which in my judgement make it clear that there was time for reflection and time for cooling off, because on any view of the evidence what happens is that he goes to the attic, collects a gun, he brings that down and places it in the car, the car is then driven from his house a distance of some two miles via a petrol filling station to the place where these events occurred and there is then a walking, albeit of a short distance, from a place where the car is to the house. That seems to me to be evidence which takes this case outside the sudden and temporary loss of self-control ...[49]

During the subsequent appeal against conviction for murder, the Court of Appeal confirmed that such an approach was 'too austere' for the purposes of s 3 of the Homicide Act 1957, which places emphasis very much on the function of the jury as opposed to the judge in determining what constitutes a sudden and temporary loss of self-control. Apart from the inappropriate assessment of the facts as 'taking the case outside' the ambit of the test, reference might also have been made to the judge's recourse to a linguistic device of *decelerated chronology*, in which each physical movement is accorded 'kernel' prominence in order to displace the claim of sudden loss of self-control. Most interesting, however, was the *rhetorical* support given at appeal by Henry LJ to toleration of a less than sudden and less than temporary reaction to provocation. His comments do not merely, as with the Court of Appeal in *R v Ahluwalia* (1992), pay lip-service to the notion of 'delayed reaction', with an immediately qualifying 'provided that there was at the time of the killing a sudden and temporary loss of self-control'. Indeed his remarks depart from purely mechanistic analysis, to moving rhetoric. Does this signal a departure from merely hygienic abstractions? Or is the father of drug-addicted sons a 20th century incarnation of his outraged predecessor? Reasonableness is implicit, with scant recourse to 'characteristics'; the verbal provocation is accorded gravity by reference to its *lifelong implications;* chronology suspends to encompass past, present and future time:

> We are dealing with threats to sons in their middle to late teens. We are dealing with threats by one who is supplying them with narcotics *which may lead to the ruin of their lives quite independently of whether the actual physical threats are carried out or not. We are dealing with a*

48 (1995) 2 Cr App R 31.

49 *Ibid*, p 36C–E.

> *father who, though no stranger to drink, behaved on this evening in a way apparently quite inconsistent with anything he had done before ...*[50]

Might Tess, or Mrs Ahluwalia have deserved full as much judicial force to be asserted on their behalf?

The three trial-narratives derived from the facts of *R v Durbeyfield* reveal law's seductive authentication of its own narrative practices Iand the doctrine's potential to evolve and accommodate revised cultural viewpoints. Formulations of the doctrine must guard against according an overly improvised narrative gloss to the incidents, distant and recent, in the perpetrator's history, as well as a random and partial admission of traits to the exclusive club of 'characteristics'. Particular care should be taken where social practices may have nurtured the sensitive trait. The 'characteristic' which determined Tess's future fatal act – like the 'characteristic' which drove Mrs Ahluwalia at speed towards the inevitable, tragic conclusion – was culturally determined. Yet since the law is so intimately both a creator and creation of culture, doctrinal objectivity is impaired. Hardy postulated in this instance that it was not the fact of being seduced or raped which scarred Tess. It was the social construction placed upon her as soiled, as an outcast, as a *thing*. The *thingness* of being 'impure' is neatly evidenced in a Victorian case which has powerful links to the case of Tess. *Moss v Moss*[51] was concerned with determining whether a marriage could be annulled on the basis that the wife was pregnant by another man at the time of marriage: the case was analysed in the language of the law of contract. So what was at issue was whether the mistake about the condition of the bride, or indeed any bride found not to be intact, was a mistake as to her identity, or merely a mistake as to the *quality* of the bride *thing*. This is echoed in *Tess*: 'You were one person, now you are another' says the groom, on discovery of her imperfection. In *Ahluwalia*, the 'characteristic' first put by the judge as being relevant to the doctrine of provocation is that of being 'a married Asian woman'. This conveys nothing apart from an unhelpful and ghostly stereotype. What was relevant was the *thingness* of being a married Asian woman under those circumstances; of being disempowered, isolated, deprived of personhood.

Counsel for Mrs Ahluwalia argued that the condition of battered woman syndrome and the related state of 'learnt helplessness' was a condition which could have constituted a legitimate 'characteristic' for doctrinal purposes. 'Learnt helplessness' certainly describes the state of mind exhibited both by Mrs Ahluwalia and Tess in their letters and behaviour and typifies the alienated state that is dissociation; it is feasible that this state might last for days or weeks and encompass acts of apparent premeditation. Yet there is a danger that, in accommodating this condition within the realm of accepted 'characteristics' the moral force behind such cases will bow to the merely mechanical. For 'learnt helplessness' and 'dissociative states' are at least as relevant to the primitive cold blood/hot blood polarity as to 'characteristics'.[52] Ashworth ((1995), p 268) concludes 'the suddenness test is objectionable in principle because it favours those with quick tempers over those with a slow burning temperament (but no less intensity of emotion), it favours

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50 (1995) 2 Cr App R 3l, p 38A–B (emphasis added).

51 (1897) PD 459.

52 Such conditions may inform the polar spectrum, yet remains separate from the morally suspect, instantaneous conditions set apart in *R v Morhall* [1996] AC 90, affecting the power of self-control.

the strong who can retaliate immediately over the weak who dare not, and it often favours men over women'. One might add that the test also favours mythology over enquiry and rude mechanics over morality. Justice demands that legal doctrine must strive to avoid Hardy's reproach to his time; the preservation of values 'based on nothing more tangible than ... an arbitrary law of society which had no foundation in nature' (*Tess*, p 353).

Contemporary jurisprudence

Tess of the d'Urbervilles invites a re-examination of law – in the case of Tess the execution of justice seems very like the execution of innocence. Within the law of homicide, the doctrine of provocation has a chequered and complex history, not least in relation to the 'characteristics' to be ascribed to the reasonable man or woman. As Chapter 1 indicated, the notion of the reasonable man has become deeply problematic, nevertheless its doctrinal counterparts remain. How would doctrine really have treated Tess in her time? How would it treat her – or her counterparts – now? With three notional 'trial-narratives' 'testing' the developments in legal doctrine against the 'facts' of *Tess*, disturbing fissures appear between the doctrinal equation and rational review. This 'dislocation' can be ascribed to the rigidity of doctrine, which will 'recognise' certain events as salient, whilst remaining 'blind' to other, possibly equally salient, events. Thus the 'science' of law is clearly less objective than it appears, and disturbingly subject to cultural predisposition. As Goodwin's analysis of Trial Narratology reveals, the 'forensic' cloak of trial discourse obscures strategies of foregrounding in terms of event and time (Goodwin (1994)).

Social constraints and prejudices inscribe the individual agent with a pre-determined identity. This contributes to the 'production' of the crime to a degree more fundamental than the law – and our vision of the autonomous subject – will admit. This interplay – of social and cultural 'predetermination' – is still evident in modern caselaw. The doctrine of provocation (even that of diminished responsibility) is notably inappropriate to cases of dis-empowered and abused women; of female victims-turned-perpetrators. The entire doctrinal framework, with its attempt to identify those 'characteristics' or 'lapses' which will separate the 'deviant' from the 'reasonable' is misconceived; little or no account taken for example of the entirely uncharacteristic turn of behaviour exemplified when abused persons finally 'break'. Yet the issue is not entirely clinical or doctrinal. Rhetorical force and devices may still steer the doctrinal equation – depending upon (unchallenged) juristic inclination.

Our journey through the caselaw and attitudes reflected in *Tess* clearly illustrates that the law of the time was incapable of comprehensive and neutral adjudication of facts pertaining to such a tale. Crudely, this can be attributed to 'the dominance of patriarchal values'; it would be an understatement to say such values 'permeated' or 'suffused' society, they were society. Despite the cogency of the links between powerlessness, exploitation, class, gender, identity and individual action constructed in *Tess*, institutional power was not *equipped*, conceptually, linguistically, politically to respond to them, even had its agents been sympathetically inclined (and institutional signals would have indicated that they *should not* so be) and the novel regarded as a serious site of legal as well as social critique (there *were* rare instances of novels heralding change – *Uncle Tom's Cabin*, for example. Mrs Gaskell wrote *Ruth* with the very purpose of inducing more

understanding for the plight of 'fallen women'). The structures *within* the institutions of law central to any potent response were, as we have seen, *built* to resist such change and *focused* upon quite different concerns: dominant values are *somatic*, to borrow from biology, mitotic rather than *meiotic* production is promoted by institutional structures. The 'internal' jurisprudence of crime would have been deaf to such claims, so too 'broad' jurisprudence, not merely because the late Victorians were energetically committed to broad domestic reform and the creation of vast legislative structures both at home and abroad. A more subtle influence was at work, an influence latent, yet wholly potent in politics and law over time: the contest between different manifestations of 'moderation', alongside a largely uncontested model of mankind. That 'The President of the Immortals had ended his sport with Tess' is the textual accompaniment to Tess's execution, indicates the ludic, antic backdrop to individual destiny. Yet, like the texts at the end of the 20th century, Tess not only queries the partisan justice thereby produced. In this earlier *fin de siècle* too, there are indications of a developing awareness – that our understanding of our 'physical' and 'meta'physical existence is becoming increasingly fractured. In the texts of both periods, the conjunction of the 'existential' and the 'normative' is apprehended. Simply, if immanent chaos – a dreadful void – underlies the semblance of order available to perpetrators and victims alike in their physical and metaphysical lives, their relation to ethics – the ability to mediate between physical and metaphysical – is similarly at risk.

CHAPTER 3

THE EARLY 20TH CENTURY – THE EMPTY ROOM 'THE SUBJECT' – WOOLF, JOYCE AND *THE VISCOUNTESS RHONDDA'S CLAIM*

INTRODUCTION

To the Lighthouse by Virginia Woolf and *A Portrait of the Artist as a Young Man* by James Joyce are novels concerned with the development of the nascent artist. More than this, they both identify two central features as being significant in the struggle to develop individual identity – features which affect the relation of the individual to the community, to representations of reality and thus ultimately to themselves. First, both novels grapple with the problem of how the individual might negotiate cultural and community institutions of language and subjecthood – in Joyce, these issues are complicated by the master ideologies of nationality and religion, in Woolf, the ideologies of patriarchal norms; for both, these influences are sources of repression, obstacles to the realisation of self, and of art. Secondly, both novels are concerned with a dominant philosophical question – of how the 'subject' relates to 'reality', the relationship between life and art, between subjective experience and aesthetic representation. These two themes, the material relation of the subject to ideological and cultural context, and the intellectual relation to the concept of reality (and *its* relation to the aesthetic) are relevant to constructions encountered in law and jurisprudence. Such concerns, though not fully acknowledged as such, arise in a case from the period, *The Viscountess Rhondda's Claim*.[1] Together, the two novels permit interesting comparisons to be drawn concerning the nature of subjecthood and related philosophical and ethical models. In short, the texts of Joyce and Woolf produce a dynamic engagement with philosophical questions, especially with regard to the individual's construction of 'reality'. When placed alongside a contemporaneous case – *The Viscountess Rhondda's Claim* – dealing with legal personality, the nature of personhood, of power – the construction of the individual by a 'reality', the dynamic becomes vigorous indeed, implicating not just the identities and realities of novelists and litigants, of men and women, but of philosophers and judges too – all sucked into an equalising maelstrom, yet separate, fervent and sincere.

The material context of subjecthood

In *A Portrait of the Artist as a Young Man*, Stephen Dedalus struggles to maintain a sense of self in the face of the repressive institutions of Church, State, and nationality, and of an imposed language. The struggle is pursued in order to give realisation to the ultimate expression of selfhood – that of art. With some success, Stephen liberates himself from the dictates of Church and nationhood. He problematises his encounter with reality and art by drawing upon the intellectual resources of his classical education. As nascent artist, he draws upon the inheritance of heroic tradition; this forms a bastion against the everyday

1 [1922] 2 AC 339 (HL) (Committee for Privileges).

threats to selfhood and provides a positive source of nourishment, courage and identity to the invidious process of creation:

> He would create proudly out of the freedom and power of his soul, as the great artificer whose name he bore (*A Portrait*).

His intellectual engagement with the process of creation – the world of aesthetics, of reality and representation, is mediated by the classical formalism of Thomist philosophy – by the notion of *quidditas*, to which we will return. Although treated somewhat ironically, these sources serve to elevate and enhance the sense of self, of belonging – not to the immediate community, but to the community of the great, with a uniqueness integral to the act of creation.[2]

In *To the Lighthouse*, similar material forces exist but they impinge very differently upon the feminine subject. She too must negotiate a language not her own, an identity not of her making, but here the skewed normatives of patriarchal values are all the more insidious, both to selfhood and the realisation of art. Negotiating cultural gender imperatives, the feminine subject must traverse the coercive role models of womanhood and her own ambivalence to them:

> Her daughters … could sport with infidel ideas which they had brewed for themselves of a life different from hers; in Paris, perhaps; a wilder life … for there was in all their minds a mute questioning of deference and chivalry … though to them all there was something in this of the essence of beauty, which called out the manliness in their girlish hearts, and made them, as they sat at table beneath their mother's eyes, honour her strange severity, her extreme courtesy … (*Lighthouse*, pp 10–11).

In her intellectual engagement with the universal philosophical problem of the relation of self to reality, of thought to art, she is excluded from the masculine world of education and thought engaged with these questions, where men are:

> Forever walking up and down, up and down, with Mr Ramsay, and saying who had won this, who had won that, who was a 'first rate man' at Latin verses, who was 'brilliant but I think fundamentally unsound … (*Lighthouse*, p 11).

Yet this text *does* explore the subject/object/reality complex, not from the Thomist viewpoint, but with a more holistic, obliquely Kantian perspective.

THE VISCOUNTESS RHONDDA'S CLAIM

These material *and* conceptual influences produce and shape *the law's* engagement with the notion of subjecthood. In a contemporaneous case, *The Viscountess Rhondda's Claim*, Margaret Haig, Viscountess Rhondda, applied, as the only surviving heir of her deceased father, Viscount Rhondda, to be allowed to take his seat in the House of Lords (in 1918,

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2 Though somewhat ironic, the ascription of the name Stephen 'Dedalus' marks the autobiographical character as a direct descendant of the classical tradition – Daedalus the legendary Athenian associated with ingenuity and invention. Conrad ((1987), pp 623–24) describes the progress of the character:

> Once mastered, language allows him to declare himself central to the universe … unperplexed by the linguistic obstruction of meaning and obfuscation of God … That faith exonerates language from the curse of babel … For Joyce the letter is itself a spirit …

women had achieved a degree of suffrage, demonstrating a notional recognition of women's right to equality). The petitioner based her claim to receive a writ of summons to Parliament 'in right of her said dignity' (as Viscountess Rhondda) upon s 1 of the Sex Disqualification (Removal) Act 1919, which provided that a person should not be disqualified by sex or marriage from the exercise of any public function or from being appointed to or holding any civil or judicial office or post' (it is interesting to note in passing that this case has not been accorded any significance in the annals of law – it cannot be traced in Constitutional Law or Legal History textbooks, but must be encountered incidentally either in personal accounts or by a laborious 'trawl' through appeal cases).[3]

Prior to the hearing in the House of Lords, the Committee of Privileges awarded the Viscountess her right, but on appeal to the House of Lords, her claim was denied. The case is summarised in brief in *Lives of the Lord Chancellors*, in the section devoted to Lord Birkenhead (who delivered the majority judgment):

> In 'Viscountess Rhondda's Claim' (1922), the 'massive irony of Gibbon' was employed to expose the historical fallacies inherent in the belief that a peeress in her own right was entitled to sit and vote in Parliament. In a judgment covering thirty-two pages of the Law Reports Birkenhead held that a peerage held by a peeress in her own right is one to which in law the incident of exercising the right to receive a writ is not and never was attached. By the majority of twenty-two to four the Committee of Privileges (which had previously decided in the opposite sense) rejected Lady Rhondda's claim.[4]

The majority achieved their result by taking an apparently formalist approach to precedent and statutory construction. Ancient interpretation of letters patent and precedent were invoked in order to resurrect the feudal vision of peerage as overriding modern developments regarding equality, concluding with the bizarre pronouncement that:

> In other words, a peeress in her own right is not a person who has an incident of peerage but is disqualified from exercising it by her sex. She is a person who for her life holds a dignity which does not include the right of a female to exercise that function at all ...[5]

Now perhaps we need not be surprised and may even be a little entertained by the Big Endian and Small Endian[6] (the case actually quotes Swift to quite different Ends!) convolutions pursued by their Lordships in order to protect the Upper Chamber from that dread encroachment, Woman. The case does demonstrate, however, the intimacy of links between the production of the subject in the legal and social context. Stephen Dedalus may rail against the oppressive forces which would shape him – 'I will try to fly by those nets' – yet he has an *integral* claim, should he choose to acknowledge it, to 'personhood', citizenship, dignity. *The Viscountess Rhondda* case demonstrates how the skewed normatives depicted in *To the Lighthouse* work materially in relation to woman – she is a 'person' who holds a 'dignity' (thereby ascribed positive qualities) but both

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3 I wish to express my thanks to Professor Peter Goodrich for first drawing my attention to this case.

4 Quoted from Heuston ((1964), p 402).

5 [1922] 2 AC 339, p 363.

6 In *Gulliver's Travels* by Jonathan Swift, politicians are satirised as engaged in heated debate as to whether boiled eggs should be cracked at the 'big' end or the 'small' end. The image frequently seems apposite in the study of elaborately evasive and technical law cases.

notions are so inverted in practice as to be divested of positive meaning – a powerful example of deconstructive spectres. With regard to 'personhood' – surely a concept integral to the cultural and legal subject and to notions of citizenship – there is a lengthy discussion of whether the 'disability' of being a woman prevents her from being counted a 'person'.[7] Quoting legislation (reviewed in a case from 1909) giving a right to vote in University elections in Scotland 'to every person of full age and not subject to any legal incapacity', it is concluded that such words were not meant to extend to women:

> It proceeds upon the supposition that the word 'person' in the Act of 1868 did include women ... it is a dangerous assumption to suppose that the legislature foresees every possible result that may ensue from the unguarded use of a single word ...

As far as the word 'dignity' is concerned, the majority asserts that:

> For many centuries women have not sat in the House of Lords, although during those centuries there have been women who possessed peerage dignities in the sense – whatever it be – in which Lady Rhondda possesses such a dignity ... In 1663, the dignity of Lucas of Crudwell was conferred by letters patent upon Mary, Countess of Kent. The limitations in the patent are very curious. They are first to the heirs male of the body of the grantee by the Earl of Kent, her husband, then to her heirs of the body by the same husband, with a special provision that if at any time there be a default of issue male of the body of the Countess and more persons than one who are co-heirs, the dignity is to be had and enjoyed by such one of the co-heirs ... It is quite clear that it was intended that those who were males, and those who were males only, should sit in this House, and that it was contemplated that those females who in accordance with the terms of the patent would come into possession as heirs of the body should hold a peerage dignity divorced from the right to sit and vote ...[8]

Now of course this historical construction of 'dignity' relates to woman's position both as 'property' – as the decorative yet neutralised embellishment of her husband (and sons) *enfranchised* 'dignity' – and as 'vessel' – as the (sadly necessary!) channel through which the male line passes, *absent* interference from the feminine mind, body or identity except insofar as she mediates male lines. Dignity? Indignity? So, 'women can't sit, women can't vote' and 'woman' does not necessarily denote 'person' (or vice versa) is the conclusion to the case, echoing 'women can't paint, women can't write' – the male echo behind the female artist in *To the Lighthouse*, positioning man as the subject at the centre of the world, woman his adjunct ...:

> [Mr Ramsay] must be assured that he too lived in the heart of life; was needed; not here only, but all over the world ... Could Mr Bankes have said why that woman pleased him so; why the sight of her reading a fairy tale to her boy had upon him precisely the same effect as the solution of a scientific problem, so that he rested in contemplation of it and felt, as he felt when he had proved something absolute about the digestive system of plants, that barbarity was tamed, the reign of chaos subdued ...

The case does not simply exemplify the *material* marginalisation of the feminine subject, her disability, her degraded personhood, but also a confluent *conceptual* pathway – the majority judges achieve their result by rule formalism which aligns the female subject

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7 The antecedent and subsequent sightings of 'persons' cases present an elegant study in themselves – see Barnett (1998), p 24 and (1997), pp 107–19.

8 [1922] 2 AC 339, p 355.

with his rule over the world of objects – the subjected subject becomes conflated with object. This may refer us back not merely to contrasting social interactions depicted by Woolf and Joyce, but also to the philosophical models of subject and object exemplified in their review of the aesthetic, of relevance to jurisprudential views of the legal subject. The rule formalist approach ('barbarity was tamed'!) is adopted with equal adroitness by Viscount Haldane, the dissenting judge, to construct an opposing view:

> General words have, of course, on occasions been given by the Courts restricted interpretation. But that has been only when the scheme of the Statute read as a whole, or the special character of the purpose as expressed by the Legislature in the statute itself or in some other Statute or law on which it bears, indicates such a restriction as intended by the Legislature itself. Now here, the very title of the Act negatives this, for it shows that the removal of sex disqualifications of all kinds imposed by the law was its express and general purpose.

Nevertheless, whilst claiming this juristic pedigree of master formalist – and the legitimacy pertaining to that status which clearly rules amongst his peers, Haldane attempts to 'shift' the logistics of such formalism by beginning with *inclusive* notions of subjecthood and 'dignity':

> Assuming Lady Rhondda to have, by grant from the Crown, the full status of nobility in the form of a viscounty in her own right, but no title to sit in your Lordship's House declared in the letters patent creating the dignity, is she entitled to a writ of summons? Such a dignity is analogous to an estate in real property and is an inalienable incorporeal hereditament flowing from the Sovereign as the fountain of honour ...[9]

(the rhetoric used is crucial: Haldane speaks of *her own right*, and parries with an armoury of legitimating parallels in order to bring the otherwise incongruous notions of 'woman' and 'power' together. There is consistency in the finding that Lord Haldane was sceptical of axiomatic viewpoints, of mastery of the world of objects (he wrote *The Reign of Relativity* – 'all knowledge is relative') and his rejection of retrogressive formalism. This scepticism is maintained in his view of the relation between art and reality and resonates with the vision later enunciated by Woolf; in *The Pathway to Reality* he says:

> The poet, the artist, or the simple religious person, each expressing himself in images or in appeal to the emotions, is capable of reaching in his own way, the highest result of speculative thinking. Abstract reasoning ... has no monopoly of the means of access to reality, although I hold it to be the only competent guardian of the pathway.[10]

SUBJECT, OBJECT AND THE NATURE OF REALITY

Forms of intellectual engagement with the issue raised by Viscount Haldane – of the relationship between art, 'abstract reasoning' and the 'means of access to reality' – are explored in both *A Portrait of the Artist as a Young Man* and *To the Lighthouse*. The question is pressing in Modernist literature not just because of philosophical debates current at the time, but also in relation to exploration of 'consciousness', especially in the wake of undermined Divinity. *In A Portrait*, Stephen approaches the issue from a broadly Thomist

9 *Ibid*, 384.

10 Quoted in *The Dictionary of National Biography* (1922–30) – entry for Haldane, p 385.

perspective[11] – reasoning derived from the deductions of St Thomas Aquinas, though for his purposes, secularised:

> In order to see that basket, said Stephen, your mind first of all separates the basket from the rest of the visible universe which is not the basket. The first phase of apprehension is a bounding line drawn about the object to be apprehended. An aesthetic image is presented to us either in space or in time. What is audible is presented in time, what is visible is presented in space ... you apprehend its wholeness ... then ... you make the only synthesis which is logically and aesthetically possible ... you see that it is that thing which it is and no other thing. The radiance of which he speaks is the scholastic *quidditas*, the whatness of a thing.

Stephen poses himself some questions to test the logical progressions outlined: 'Is a chair finely made tragic or comic? Is the portrait of Mona Lisa good if I desire to see it? and concludes that:

> The personality of the artist, at first a cry or a cadence or a mood and then a fluid and lambent narrative, finally refines itself out of existence, impersonalises itself, so to speak. The aesthetic image in the dramatic form is life purified in a reprojected from the human imagination.

However this engagement with the concept of the aesthetic, with subject, object and the nature of reality, is not pursued in the narrative *fabric* of *A Portrait*. Overall, the relation to the world of objects remains instrumental: a utility without community. In *To the Lighthouse*, the woman artist is excluded from the masculine world of formal thought; Stephen's access to classical philosophical tradition is denied her:

> She asked him what his father's books were about. 'Subject and object and the nature of reality' Andrew had said. And when she said Heavens, she had no notion what that meant. 'Think of a kitchen table then', he told her, 'when you're not there'.

The masculine characters are wholly immersed in their engagement with classical philosophy and their potential contribution to it:

> It was a splendid mind. For if thought is like the keyboard of a piano, divided into so many notes, or like the alphabet is ranged in twenty-six letters all in order, then his splendid mind had no sort of difficulty in running over those letters one by one, firmly and accurately, until it had reached, say, the letter Q. He reached Q. Very few people in the whole of England ever reach Q ... But after Q? What comes next? After Q there are a number of letters the last of which is scarcely visible to mortal eyes, but glimmers red in the distance. Z is only reached by one man in a generation. Still, if he could reach R it would be something. Here at least was Q. He dug his heels in at Q. Q he was sure of. Q he could demonstrate. If Q then is Q – R – Here he knocked his pipe out ...

With no little irony, despite the well evidenced exclusion of woman from these pursuits, the text explores and deploys the relation of subject to object in many forms – through individual characterisations, through the relation of individuals to the domestic and wider community, through the interaction of the artist Lily Briscoe[12] with her art, and

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11 Conrad ((1987), p 602) notes that 'The god with whom Stephen allies himself in *A Portrait* is a disdainful aesthete'; it is this aspect of the divine – and patriarchal persona which Stephen adopts for his philosophical progress into an aesthetic, existential and secular enquiry.

12 'Lily Briscoe' is a name of deliberate humble urbanity, underscoring the lack of claim to a classical identity.

most profoundly, through the seamless engagement with the issue in the narrative fabric.[13] The world of objects, as exemplified by that kitchen table, has a fluid, sometimes comic relation to subjective perception. The dogmatic entrenchment and replication of theory as discrete and hermetically sealed *law* (and here we may bear in mind the Thomist, the jurist as well as the pursuit of the elusive 'Q') is at least a little vulnerable to the quirks of human reason, to local interference from the subjective, most of all from an undue separation from the material world it seeks to examine.[14] So, when Lily thinks of the table again it 'lodged now in the fork of a pear tree', and is 'grained and knotted', with a virtue which seemed 'to have been laid bare by years of muscular integrity'.

The invitation to consider 'subject and object and the nature of reality – think of a kitchen table, when you're not there' is pursued and explored through the entire central section of the book – 'Time Passes', which contemplates the material world – the world of objects *in the absence* of persons, or subjective vision, echoing the apprehension voiced in *Tess of the d'Urbervilles* of an indifferent physical world, an indifferent nature. 'Time Passes' combines doubt regarding the teleological agenda of theory:

> Did nature supplement what man advanced? Did she complete what he began? With equal complacence she saw his misery, condoned his meanness, and acquiesced in his torture. That dream, then, of sharing, completing, finding in solitude on the beach an answer, was but a reflection in a mirror … (*Lighthouse*, p 146).

With an aesthetic challenge. The quest for 'Q' and for '*quidditas*' – in short the pursuit of synthesis with, and mastery of the physical world through rationality, is challenged in the depiction of a physical world *absent* human interaction with it, confronting mankind with his contingency, his mortality. Whilst human history, both personal and political, occurs as footnotes, or rather in cursory parentheses in the passage, the empty room, the empty house – by implication, the kitchen table, 'when you're not there – is given centre stage, its life a march as relentless and as beautiful as radioactive decay:

> Flies wove a web in the sunny rooms, weeds that had grown close to the glass in the night tapped methodically at the window pane. The stroke of the lighthouse … laid itself with such authority upon the carpet in the darkness. Now and again some glass tinkled in the cupboard … (*Lighthouse*, pp 144–45).

In *A Portrait*, the subject remains central, the material world mediated through, and therefore dependent upon, subjective perception; *To the Lighthouse* depicts a material world beating with a life of its own, the subject pushed to the margin, or beyond view:

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13 Woolf herself was resistant to prescriptive utilisation of narrative, moreover characterisation of a woman artist creates a fluidity of relationship between the intuitive abstractions on the canvas and those of the prose.

14 Conrad ((1987), p 625) recognises a fascinating link between Woolf 's exploration of language and reason and Joyce's later work, *Finnegan's Wake*:

> The alphabet in *To the Lighthouse* is a tundra of haughty, skeletal initials, where the only destination is a zero. In *Finnegan's Wake* those bleak letters which are Mr Ramsay's signposts [in Woolf] interlink in a human chain binding us to the primal father, and they are forever intermarrying …

For Woolf, insofar as such underlying themes of primal parenthood were latent, the presence and absence of the mother would have formed an integral link in such a chain, had the canon allowed.

> So loveliness reigned and stillness, and together made the shape of loveliness itself, a form from which life had parted ... (*Lighthouse*, p 141).

When human consciousness *is* glimpsed, in the distance, there is some folly in the relation of subject to the material, in the drive to impose order, to abstract and occupy central space; distancing the mortal frailty embodied in the domestic:

> In those mirrors, the minds of men, in those pools of uneasy water, in which clouds for ever turn and shadows form, dreams persisted and it was impossible to resist the strange intimation which every gull, flower, tree, man and woman, and the white earth itself seemed to declare (but if questioned at once to withdraw) that good triumphs, happiness prevails, order rules; or to resist the extraordinary stimulus to range hither and thither in search of some absolute good, some crystal of intensity, remote from the known pleasures and familiar virtues, something alien to the processes of domestic life, single, hard, bright, like a diamond in the sand, which would render the possessor secure.

It would be tempting to draw some 'essentialist' conclusion from this textual comparison, that (sometimes favoured) view that woman's relation to the material world is more authentic, that she is 'naturally' more sceptical of masculine abstraction, or that man is 'essentially' alienated, paving the way for a feminist critique which favours either 'cultural' or 'radical' feminist conclusions. It may be that such insights are gained in the very occupation of 'the margin'. Certainly Woolf 'triumphs' in so far as she 'embeds' the discourse concerning subject and object within the text with a greater degree of sophistication and sensitivity to the implications – we *may* say that Woolf 'trumps' Joyce. Most profoundly, she posits a world in which the subject is not *necessarily* central, and again it *might* be deduced that this springs in part from the enforced marginalisation of the feminine subject – that Woolf is simply – through the text – 'reflecting' rather than 'critiquing' the concept and position of subjecthood. Yet the text seems less partisan and more challenging than this. Although quick to depict the shortcomings of her male characters – their egoism, neediness, self-aggrandisement; she recognises the foibles and weaknesses of their feminine counterparts. Both sexes are trapped in pre-ordained roles, yet both experience the depth of the conundrum that is existence. The potential is for both sexes to contribute to community. Positioning the feminine subject's engagement with the problem of reality through the role of the artist, some liberation from the repressive objectification of *The Viscountess Rhondda* can be achieved; potential release from the patriarchal imprimatur is epitomised also in the little boy James Ramsay who in maturity, sees his father:

> Now against the waste of waters running away into the open, like some old stone lying on the sand ...

– together the textual 'community' permit glimpses of the full spectrum of human potential.

THE PHILOSOPHER-JURIST

The Viscountess Rhondda case did not identify itself with either 'positive' or 'natural' law models of legality; indeed, overt references to these theoretical 'rationales' of legality do not often appear in the 'workaday' discourse adopted in caselaw. In so far as the case was

conducted as a purely technical and not social, or moral question, there was no need to 'invoke' the legitimating conception of law as 'positivist'. Yet the tracing of origins of power, right and privilege whilst claiming a value-neutral stance is arguably in itself an invocation of 'positivist' methodology. From the judicial stance, denial of the Viscountess Rhondda's claim did not pose a gross threat to morality, nor were the arguments for or against her claim conducted in 'moral' terms. Thus neither side resorted to the tenuous and 'fundamentalist' claims of 'natural' law – the Viscountess Rhondda's representatives, and the dissenting judges, were forced to 'out-positivist' the majority, returning a technical armoury to meet that of their opponents.

The 'marginalisation' of the human citizen-subject, the fluidity of relation, subject to object, seems very modern, even postmodern, and can be linked to present preoccupations with contingency in law.[15] Seen in this light, the dissent of Lord Haldane seems potentially even more progressive. Indeed, just as Ayer developed 'a rejection of the metaphysical thesis that philosophy affords us knowledge of a transcendent reality in *Language, Truth and Logic* in 1936 – long before Derrida' (Murdoch (1992), p 42), one is struck by a similarly impressive *modernity* when reading Haldane's *The Reign of Relativity* (1922). Haldane extrapolates from contemporary developments in the world of science – chiefly Einstein's Theory of Relativity – and recognises a concomitant potential significance, at least by analogy, in the notion of relativity in philosophy, epistemology and metaphysics.[16] Haldane remarks:

> It is to be regretted that the title 'theory of relativity' was ever appropriated to the extent it has been for Einstein's doctrine ... What he is concerned with is relativity in measurement – space and time only, and relativity extends to other forms of knowledge as much as to that merely concerned with quantitative order ... The principle of relativity applies to all standpoints determined by conceptions appropriate indeed to particular orders of knowledge but thereby of a limiting character. It seems therefore accurate to regard quantitative relativity as only a special illustration of a wider principle ... (Haldane (1922), p 129).

Such connections were being developed, as Haldane recognised, by a confluence of thinkers including McTaggart, Whitehead, Bradley, Bosanquet and Alexander.[17] The movement demonstrated a divergence from the relation between science and philosophy which has been asserted by the inductive methods of Comte and Austin. With their respective formulations of 'positivist' and 'legal positivist' theories, extrapolated from faith in the (apparent) certainties of science, Comte and Austin gave *precedence* to science over other epistemologies. Haldane, on the other hand, with his recognition, rooted in

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15 Eg, Conklin quotes Gabel, who argues (Conklin (1996), p 191): 'Metaphysics offers a false form of unity that is imaginary in nature ... law is just a form of consciousness, a belief cluster' and, Conklin concludes:

> The professional knowers are situated in a tragic paradox. Even when the historically contingent authors [of the law] claim that universal human rights exist, at that very moment professional knowers search in vain for an absent object which will authorise the claim ...

16 For the complex developments in this period in understanding metaphysics, see John Passmore's discussion of LS Stebbing's review of metaphysical analysis and the emergent logical positivism (Passmore (1968), p 364).

17 Passmore notes that Haldane was 'an exception amongst philosophers' in his willingness to attempt a synthesis (he was a 'faithful Hegelian') of developments in physics with those of philosophy (Passmore (1968), p 332).

Hegelian philosophy, that *all* knowledge is relative, occupies a presciently modern locus in early 20th century thought. Preceded by Austinian legal positivism, bridging an era with the logical positivists Carnap and Ayer (for whom a linguistic scientific model of law would override the metaphysical) Haldane maintains a belief in the preservation of a vigorous interaction between the worlds of fact and value, and a resistance to the canonisation of science and scientific method. Thus sceptical of cultural pedantry, we would expect him to be willing to adapt to the changing face of law and the contingent world.

How does all this link Woolf, Joyce and the Viscountess Rhondda? We have noted a link between Woolf and Joyce's artistic depiction of the intellectual debate on the relation between subject and object and the nature of reality, and produced a crude analogy between this and the 'objectification' of the Viscountess Rhondda. There is arguably then a common foundation to the link between the 'theoretical' and 'material' engagement with the world. Haldane's foregrounding of the relativity of knowledge places him in sympathy with the aesthetic enquiry conducted by Joyce and more particularly Woolf, whilst the interpretative practices employed by the majority judges exemplify a degree of intellectual 'amputation' exhibited both in the particular case – 'think of a table when you're not there' – and in the general pursuit of 'Q'. Thus (even taking account of the still prevailing patriarchal culture) there is for them nothing bizarre in holding that the feudal roots of peerage are more potent than the cultural revolution presaged by the Act of 1919.

In addition, Woolf and Joyce remind us that there is a link between this engagement with the *abstracted* world and that of the contingent and material world. For both set their interrogation of intellectual history in the context of the cultural contingencies of social and linguistic identity, whether by gender, class or nationality. Their recognition that *this* world is to a great extent, historical incident, moulded by social values rather than physical or metaphysical ones, ties them more conclusively to the dissenting position of Haldane, who asserts in *The Reign of Relativity*:

> In ethics, in the recognition of each other of whatever race as human and as therefore entitled to respect as persons, in religion, in art, and in knowledge, local particularity counts for little (Haldane (1922), p 47).

Alongside the rational and 'value-neutral' tracing of mediaeval sources for their judgement, their Lordships hold an opportunity for equally rational and 'value-neutral', legal affirmation of the statutory development asserting equality of access to public office for women. Their inability, or refusal to acknowledge this alteration to their world as an adjustment of the social contingent, as opposed to incommodious distortion of a mediaevally-derived status quo at least raises a question as to the legitimacy of their claim to neutrality and also suggests an essentialist approach to some aspects of the contingent world.

Given the nascent influence of the 'positivist' model of law, with its claimed potential for justice through a 'formulaic' approach to interpretation, one might have expected the majority approach in the case to have been positivist in style, so avoiding any charge of partiality. An overt appeal to 'natural law' principles in such a case – that natural law indicates discrete roles for men and for women for example – clearly would have provoked antagonism at a time when the statutory empowerment of women had resulted in part from their active contribution to the war effort. Thus although recourse to such

'naturalist' arguments appear in muted form – tracing the absence of the right to sit to the 'respect due to women and to a sense of decorum and not to their want of intellect'[18] for example – the gendered nature of the issue is as far as possible obscured from view. The decision is forced to run an uneasy gauntlet between such archaic 'natural law' arguments and the positivist stance simpliciter. For the rule positivism implied by strict adherence to a new and radical statute – even one covertly characterised as a 'hard case' – would have forced their Lordships to conclude, as did Haldane, that the Act extended to all women, through its 'general and sweeping' nature; a 'general release from disability arising from sex to exercise public functions'.[19] Only by a tortuous dalliance with the *contra proferentem* rule, uneasily placed somewhere between the Statute and peerage dignity, can the Lords avoid this conclusion. So, as Counsel for the Crown argues, 'it may be necessary to construe an Act contrary to the strict letter'.[20] Lord Birkenhead expands:

> A long stream of cases has established that general words are to be construed so as, in an old phrase, 'to pursue the intent of the makers of the statutes'... which arise from a close consideration of the mischiefs sought to be remedied and of the state of the law at the moment, when the statute was passed. 'The Sages of the Law' say the Barons of the Exchequer in *Stradling v Morgan*[21] after the consideration of a long line of cases, 'heretofore have construed Statutes quite *contrary*[22] to the Letter in some appearance and those Statutes which comprehend all Things in the Letter they have expounded to extent but to some Things, and those which generally prohibit all people from doing such an Act they have interpreted to permit some People to do it, and those which include every Person in the Letter they have adjudged to reach to some Persons only ...[23]

(Again, if the reader feels momentarily transported to a case not of the 1920s, but of the 1720s, it is to be expected – Swift's satirical creations unwittingly eclipsed by Birkenhead's choice of sources.)

With no little irony, Haldane is thus obliged, though by nature a 'spirit' rather than 'letter' man, to argue for a rule-positivist adherence to strict interpretation of the statute, an approach necessary not just to realise his object, but to create an equally 'potent' form of opposition to the majority.

It is understandable that their Lordships retreated to the complex and arcane roots of peerage dignities and letters patent, for the issue was at heart not merely technical but deeply political – whether a woman should be allowed to storm this last bastion of male power, the House of Lords. It may well be the case that analytical jurisprudence could identify a legitimacy and rationality inhering at least as forcefully in the arguments for the Crown as in those for Viscountess Rhondda, for the feudal roots of peerage, with its linguistic fretwork of 'privilege', 'letters patent', 'dignity' and 'sanctity' held not merely rhetorical, but technical and *real* potency in the corridors of power. Yet Haldane's

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18 [1922] 2 AC 339, p 341.
19 *Ibid*, p 382.
20 *Ibid*, p 347.
21 (1558) Plowd 199, pp 203, 205.
22 Emphasis added.
23 [1922] 2 AC 339, p 369.

argument – that the 1919 Act negates the former 'disability' inhering in the person denoted 'woman' is a powerful one, so much so that Lord Birkenhead feels obliged to assert it:

> Impossible ... to suppose that the legislature when endeavouring to confer upon women a privilege which was coupled with a duty could have used words which were so loose as respects the privilege and so inapt as respects the duty ...[24]

– an assertion traceable to logical positivism or semantics. Birkenhead entrenches this position with the rejoinder to Haldane that, in any event, in the context of a decision of the Committee for Privileges in the House of Lords, the resolution of the House must be accepted as final.

The decision *may* be characterised as the product of its time in the utilisation of a ponderous form of statutory interpretation which has not yet brought the 'purposive' approach to full consciousness. As Twining and Miers point out ((1999), p 281):

> ... the Law Commissions argued in 1965, it is anachronistic to approach the interpretation of legislation dealing with such matters as education, employment, social security, the environment, taxation ... as if it were 'only designed to deal with an evil'. Such an approach simply fails to recognise that the bulk of modern legislation, as in the areas mentioned, is enacted 'to further a positive social purpose'. Its interpretation should not therefore be constrained by the limited perspective implied by the mischief rule ...

Yet even the constraints of the mischief rule, dating back to *Heydon's* case[25] give poor authorisation to this majority reading.

In one sense, the case may be characterised as one in which the dying refrain of feudal values is revivified by an adroit judiciary. In doing so, they are forced to invest feudal notions, chivalric, misty and semi-mythological, with sufficient semantic stability to satisfy the nascent strictures of logical positivism. Quite apart from the enduring and pervasive influence of the 'deconstructive' content in words, the cultural historicism of semantics – the changing morphology of words over time, is indicated in the case. Representing a real clash of ideologies and attendant terminologies – the one ancient and highly developed, the other new and almost wordless – it is interesting to ponder how the contemporaneous Hohfeldian oppositions might be forced to submit to a 'wild variable' in those oppositions: the notion of linguistic mutation.

The case can thus be understood on broad theoretical and broad socio-political grounds, effectively holding a mirror to the odd conjunction of theoretical abstraction, gendered values and silken but savagely inverted meaning maintaining feminine impotence – the 'dignity' without right, the 'privilege' without power, as Woolf expresses it, the:

> Code of behaviour ... whose seventh article ... says that on occasions of this sort it behoves the woman, whatever her own occupation may be, to go to the help of the young man opposite so that he may expose and relieve the thigh bones, the ribs, of his vanity, of his

24 *Ibid*, p 373.
25 (1584) 3 Co Rep 7a.

> urgent desire to assert himself; as indeed it is their duty, she reflected, in her old-maidenly fairness, to help us, suppose the tube were to burst into flames … But how would it be, she thought, if neither of us did either of these things? … (*Lighthouse*, p 99).

The network of domestic dignities, the equilibrium of homage, is a microcosm of the equilibrium steadfastly maintained by the House of Lords.[26] The threat of the 1919 Act, of Viscountess Rhondda's claim is simply the threat of that question 'how would it be … if neither of us did either of these things?' writ large.

THE SUBJECTIVE JURIST

Perhaps it is felt that the hints made so far of subjective, or politically orientated predispositions on the part of their Lordships has not been made out: indeed to suggest as much is to impugn the very notion of impartiality upon which our legal system depends. On the other hand, identifying any such predisposition from such a distant historical vantage point arguably requires little intellectual agility and simply lays bare the intricate tracework of values and norms to which the law is at any time prey howsoever it (and its creatures) strive for neutrality.

Lord Hoffman's heavily criticised removal from the *Pinochet* hearing because of his affiliations with Amnesty International[27] demonstrates that this difficulty – of the model of judge as automaton, entering court *absent* such predispositions – continues to trouble us.[28] Well intentioned, with a high degree of personal integrity, of good faith, the judge cannot entirely divest himself of his identity at the court door. It may be that the *Viscountess Rhondda* case reveals similar – yet unconscious – affiliations.

We have already touched upon Lord Haldane's deep commitment to philosophical problems – itself a mindset which arguably could allow him to see beyond the crudely transient contingent world of social mores to the dynamics of social change. Add to this the *nature* of his philosophical interest – his understanding of 'relativity' in knowledge, in social practices, and his sympathy with Viscountess Rhondda's cause seems clearer still. Here was the man who wrote (*The Reign of Relativity* (1922), p 429):

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26 Conrad ((1987), p 590):

> As an abstractor, Virginia Woolf is concerned with shape-changing. This can mean the soft fluidity to which things in the house impressionistically succumb … it can also cement the stricture of the Whitehall statues – Pitt, Chatham, Burke and Gladstone – who mobilise armies … she is concerned therefore as well with the form of words …

27 'Law Lords attacked their colleague Lord Hoffman who failed to declare links with a human rights group before ruling in a key hearing on General Pinochet' (1999) *BBC News Online*, 15 January.

28 O'Neill's comment regarding scientists might equally apply to jurists when he says (O'Neill (1999), p 14):

> If we are concerned to foster scientific practices that do not reproduce inequality and oppression, then we must advocate conceptions of scientific objectivity that challenge the external influences and background assumptions that members of the scientific community bring to their work. According to Harding, this means that the political standpoint of the scientist is a relevant consideration in the evaluation of scientific theories.

The difficulty however lies in screening for all political appetites – Lord Hoffman's affiliations were simply more overt than others.

> The mind of the State never stands still any more than does the mind of the individual. We have therefore not only to watch but to think, and to take heed lest our social organism gets encrusted with the products on an environment that is no longer suited to it …

In contrast, Lord Birkenhead, though described as a 'great orator' in his youth, betrays a more piecemeal and anecdotal grasp of the significance of his engagements with the world of ideas and of law. In his autobiography *Law, Life and Letters* (Birkenhead (1927)) an early chapter is taken up with 'Thoughts on Letter-Writing' in which he warns, regarding love-letters:

> The plague of the matter is that such letters are always kept by a woman *unless they are deeply compromising to herself.*[29] A man, half Lothario, half Machiavelli, might usefully notice the excepted case … (p 67) Napoleon, Wellington and Nelson … Each was responsive (except where the road of professional duty clearly lay elsewhere) to feminine influence. At that supreme moment in the world's history women had not the vote; could they want more than they had then? … (p 71).

In a later chapter discussing the law of breach of promise, Lord Birkenhead breaks off to assert:

> I address myself now to certain social questions which are of the utmost interest and importance. It may in the first place be very reasonably asked, in these days when equality of the sexes is so much insisted upon, whether there is any difference between a male plaintiff and a female one. In law there is none. But it is part of the crazy evolution of our modern social life that we have altogether disregarded, as if we were superior to them, the immutable laws of Nature, and the permanent distinctions of sex. Man is man; woman is woman. Woman insists on her equal rights in every branch of human life. *Naturam expellas furca, tamen usque recurret* … I suppose that in about seventy-five cases out of a hundred women will be normal and feminine … (pp 135–36).

It is simply too easy to pillory great figures in retrospect. Nevertheless, it is not beyond credence that the rhetorical stance evidenced above betrays such entrenched 'traditional' values regarding the position and roles of men and women as to colour Lord Birkenhead's *co-ordination* of the appropriate juristic approach in the Viscountess Rhondda's plea for equality.

In addition, it would be all too easy to surrender oneself to the vision of Lord Haldane as the intellectually enlightened champion of causes, Birkenhead the cruder clay. In terms of their contributions to social reform, both men present a complex profile. Lord Birkenhead's legal and political career spanned a wide range of issues. In 1924 he was appointed Secretary of State for India. He played 'a prominent part' in the General Strike of 1926 and although his views on labour relations would today be regarded as reactionary in the extreme, he was active behind the scenes in trying to produce a conciliatory formula. His efforts were praised by Labour leaders at the time (Heuston (1964), p 395).

In *Home Secretary v O'Brien*[30] Birkenhead made an authoritative assertion of the traditional bias of the common law in favour of individual liberty with regard to the status of the writ of *habeas corpus*.

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29 Original emphasis.

30 [1923] AC 603.

Lord Haldane was similarly multidimensional. As already explained, his dissenting judgement seems entirely consistent with his philosophical location and the circle is completed by his association with the Fabian Socialists Sidney and Beatrice Webb; thus *his* affiliations as well as his philosophy lay him open to a charge of predisposition. Yet in his early career he was a member of the 'Imperialist wing' of the Liberal Party, and as such a supporter of the South African war.[31] Later, his political orientation shifted to the left.[32]

CONCLUSION

To the Lighthouse and *A Portrait of the Artist as a Young Man* are both revolutionary texts in terms of emerging notions of selfhood. In exploring emerging identity, both books chart the pre-eminence of individual consciousness, its quirks and irrationalities. As fugitives from the cultural artefacts of 'local' subjecthood – nationality, religion and, in particular for Woolf, gender – (as we have seen, factors which shaped the fate of Tess quite as much as her own 'will') the characters are in active contest with convention. This engagement is also conducted, with more intellectual focus, within contemporaneous philosophical debate concerning the nature of 'reality'. Placed alongside the case of *The Viscountess Rhondda's Claim*, wherein their Lordships in the House of Lords battle to uphold their own understanding and colonisation of identity, convention, 'reality' – the texts form a seamless contest. At a gently comic-satirical level, Woolf charts the interaction between chauvinism and intellect which orchestrates the engagement with subject, object and reality in philosophy. The parallels with their Lordships are clear – for them too, the intellectual engagement with objectivity and 'reality' is fractured. At a serious level, Woolf's text takes up the philosophical question – of subject, object, of the nature of reality – arguably taking it a step further. The absenting of self-predicated by 'thinking of a room … when you're not there' is more properly understood as a challenge to *negate* the self, to recognise that 'reality' may well exist above and beyond consciousness, human or divine. At the same time, the textual play with the philosophical artefact – by imagining the kitchen table lodged in a tree for example – demonstrates an awareness of the ludic, subjective oddity of human consciousness. Against such detachment, the circularity, the cultural (and sexual) parochialism of philosophers and jurists becomes exposed.

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31 See www.britannica.com/seo/r/richard-burdon-haldane-1st-viscount-haldane-of-cloan.

32 Whilst undertaking this 'assay' of self-subversion, we may note, nor is Virginia Woolf unassailable, either on philosophical or ideological grounds. Though a supporter of Socialist causes, including women's suffrage – co-incidentally she was in fact a friend of Margaret Haig, Viscountess Rhondda, and both contributed to the radical magazine *Time and Tide* – she could make unfair and haughty judgements on the qualities of others. Noel Annan ((1991), pp 105–06) reports several such unpleasant comments. On James Joyce, he reports 'she praised Joyce in public for experimenting and finding a new form for the novel but in private expressed disgust for *Ulysses* and called it an 'illiterate and underbred book'. She appears to have adopted a tentative and instinctive approach to her utilisation of philosophical ideas. Of the passage 'Time Passes' in *To the Lighthouse* she says:

> I cannot make it out … here is the most difficult piece of abstract writing – I have to give an empty house … the passage of time, all eyeless and featureless … at once I scatter out two pages. Is it nonsense, is it brilliance? (quoted in Leaska (1998), p 254),

yet she was steeped in philosophical ideas from an early age, noting her re-reading of Plato in her diary and commenting on her erudite family discussions. Though some aspects reflect an 'instinctive' approach to concepts, the overall schemata of *To the Lighthouse* indicates a conscious, playful yet earnest grasp of underlying ideas.

The philosophical debate emerges in structural form in the jurisprudence of form and substance, the distinction between the letter and spirit of the law. With no little irony, the dissenting Lord Haldane is obliged to observe the rituals of rule-formalism in an attempt to 'rout' the skewed rule-formalism of the majority. Haldane's philosophical empathy with the concept of relativity in knowledge facilitates his more progressive and dispassionate adjudicative stance. The juxtaposition of literary, legal and philosophical texts and ideas reveals 'local' and 'universal' points of contact. Placed together, the texts interrogate one another, demonstrating the frailty of epistemological boundaries. The easy separation of form and matter is called to account. An 'existential' sensibility becomes apparent both in the parody of domestic and institutional values, and in the more profound existential challenge to philosophy sensed by Woolf. The challenge may, tentatively, invite a reinscription of community when opposed to the stance of alienation discoverable in the prevailing philosophical and juristic traditions.

The 'subject-object-reality' debate was a dominant philosophical concern in both law and literature in the early 20th century; encapsulated by the 'realist' camp, who hypothesised that material things exist even when they are not being perceived; and the 'idealists', for whom things exist only as objects of perception, the models found their counterparts in the jurisprudential divergence between 'natural law' and 'positivist' models of legality. Joyce's application of Thomist principles to the problem of aesthetics, Woolf's evocation of the scholarly debate surrounding 'subject and object and the nature of reality' with 'the table' – and her melding of this problem in the text – demonstrates artistic engagement with the pressing questions of philosophy. Though not entirely a vision derived via formal rationality (and in this she is perhaps simply more honest about her intellectual process than others might be) Woolf's depiction of the empty house is a rich metaphysical image of the problem, placing the 'perceiving subject' at the margin, thus problematising the nature of the question anew. Indeed the text engages with this philosophical issue as a question of importance in life and art, but the juxtaposition of the issue alongside a masculine world of scholarship characterised as living an aetiolated material and intellectual existence suggests a scepticism regarding the distorting effect of the carefully tended ego on questions of essence and existence.

In one sense, the 'philosophical question' regarding the role of perception in 'reality' – the 'table' question, is quite separate from the 'aesthetic question' regarding the role of perception in art; of Lily Briscoe's search for, and plea to be *permitted* an authentic vision. Yet in another sense, the two are connected. As Scruton points out:

> The aesthetic experience is a lived encounter between object and subject, in which the subject takes on a universal significance. The meaning that I find in the object is a meaning that it has for all who live like me, for all whose joys and sufferings are mirrored in me. This is reflected in the antinomy of taste. As Kant put it, aesthetic judgement makes appeal to a 'common sense': it frees me from the slavish attachment to my own desires. I come to see myself as one member of an implied community, whose life is transcribed and vindicated in the experience of contemplation (Scruton (1994), p 453).

Though not the inheritor of a classical tradition, not the 'Daedalus', or 'Ulysses' of Joyce but, quite deliberately the workaday and unheroic 'Lily Briscoe' of feminine experience, the artist in *To the Lighthouse* seeks this authentic relation to vision, all the while encountering the obstacle to its realisation which is the patriarchal judgement of her – that

women can't paint, women can't write. Though Scruton's account should not be too religiously embraced – Murdoch ((1992), p 142) warns 'How can art tell truth? … we wish to be persuaded that great art is analogous to moral knowledge, an absolute convergence of fact and value' – she nevertheless points out that:

> The distinction between fact and value … may result in a diminished, even perfunctory account of morality leading (with the increasing prestige of science) to a marginalisation of 'the ethical' (Big world of facts, little peripheral area of value) … This ignores an important aspect of human existence, the way in which almost all our concepts and activities involve evaluation. A post-Kantian theory of morals: survey all the facts, then use your reason. But, in the majority of cases, a survey of the facts will itself involve moral discrimination. Innumerable forms of evaluation haunt our simplest decisions … In many familiar ways, various values pervade and *colour* what we take to be the reality of our world … (Murdoch (1992), p 25).

Though unacknowledged, the argument is inextricably linked to the debate between natural law theorists and legal positivists. No doubt their Lordships considered their decision in all good faith in the context of their reality – those feudal values which kept alive the entire culture of privilege of which they were the living embodiment. Yet it was done only by turning away from the essentially *ethical* question confronting them in the reform of women's rights instituted by the Act of 1919.

The philosophical strands represented in *To the Lighthouse* – the table, the pursuit of 'Q' – touch upon a complex and sometimes contradictory era in philosophical development. The word 'realist' acquired different connotations in place – Germany, Britain and America – and in time, particularly between the 19th and 20th centuries. In Britain, the realist school by the early 20th century derived from the assertion that material things exist even when not perceived – tracing back to a Platonist and Kantian notion of metaphysics. Strangely (for our 'young 21st century' lay usage), 'realists' linked to belief in a world *beyond* the perceiving subject, whilst the contrasting camp of 'idealists' were not pining for a world of metaphysical ideals, but firmly asserting the central role of man the thinker-artificer – that things exist only as objects of perception.[33] Somewhat paradoxically then, we might in lay terms think of 'realists' as 'idealists' and 'idealists' as 'realists'! Certainly there were strong conceptual links between 'idealists' (for whom things exist only as objects of perception) and the logical positivism linking to legal positivism. The perceiving subject becomes central, the world of things merely the furniture which must – as with science – be logged and classified by the perceiving subject. The positivism of the majority decision reflects a willingness to apply rules *absent* the current context, and as an example of the apparently neutral 'linguistic' approach of logical positivism demonstrates the potential for abuse created by an application of rules absent context. Intrinsically, the realist and idealist philosophers are asking: can a thing have meaning independent of perception? Woolf's reply is complex. Her empty room and house *surrenders* the perceiver to a position of humility, allowing the world of essences to break through. On the other hand, her text makes clear that meaning, essence *in life* comes

33 Bizarrely, for Bishop Berkeley, his 'subjective idealism' provided a 'proof' of the existence of God – that nothing exists without perceiving minds, and that the continued existence of things in our absence is thanks to the continuing perception of God. I thank my colleague Richard Ireland for further 'completing the circle' with this observation.

through relationships, through the integrity of the community, of the moral life realised in mutual respect for individual integrity. Both the artist and her art – the perceiver and perceived are expressions of this communally realised integrity, together bringing *quidditas* into action.[34]

Positivists assert that a legal system can be identified quite separately from its purpose – that law and morality should be independently verifiable. Natural lawyers argue that the form and purpose of a legal system cannot be separated – that law, like a table, can only be rendered intelligible by a consideration of purpose, and the inherent purpose of a legal system is moral aspiration. For a natural lawyer therefore there is an 'ideal' in the realist sense – a moral essence to law, as opposed to a mere mechanical framework. Woolf touches upon this relation between the thing, its purpose and the moral life. The table, the room may exist independent of the perceiver, with an essence all its own, but in *human* terms this essence interacts with the community of perceivers who inhabit it. Though the object eludes the perceiving subject – with the table lodging in the fork of a pear tree, it also interacts with her and this interaction, this *aesthetic* perception of elusive metaphysical essences, has a *moral* quality. When the subject perceives the table again it is 'scrubbed clean with years of muscular integrity' – not merely the *purpose* of the table, but the *domestic intimacy* of subject and object reveal the 'inner morality' of the perceived.[35] The link between art and law, between aesthetics and morals, matter and form, may seem tenuous. Korsgaard explains the moral importance of the 'realist' stance ((1996), pp 2–5). For Plato, Aristotle, 'form is more real than matter' – the aspiration towards an ideal form dominates the incidental physical stance of matter – 'But the death of God did not put us back into Plato's world' because in the meantime thought had completed a revolution; '… the world is no longer first and foremost form, it is *matter*'. Matter, objects are simply, as they are for the positivists, our creatures, but, says Korsgaard, 'Form must be imposed on matter … in the work of art, the work of obligation'. In *The Viscountess Rhondda's* case this intimacy of subject and object, of jurist and judged is denied; a perfectly tenable position obtains, the *purpose* of the statute, with the 'inner morality' it contains, can be cut adrift.

The depiction of the empty room, of humanity pushed to the margins or beyond view, also anticipates the 'existential' apprehension dominating later writers. If nature, the physical world, subsists outwith the purview of Man, with *man* unheard at the margin, it is not simply his insignificance, but his *mortality*, the frail and *contingent* nature of his existence, which insists upon the picture. Disinterested consideration of the status of a table, a room, perceived and unperceived, is not fully achieved so long as the bigger 'furniture' so reassuringly ranged about the scholar – of class, education, nationhood

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34 Conrad elaborates ((1987), p 588):

> Like Wordsworthian infants, Virginia Woolf's people are members of nature, and of one another. To be individuals is their agony …

Conrad's conclusion however (p 589) that 'The parentheses within which the characters of *To the Lighthouse* abruptly die are the instruments of a novelistic euthanasia' can be vigorously disputed, as this chapter suggests. The parentheses are rather a recognition of the proper location of mankind in the light of mortality.

35 This intimacy of aesthetics as a convergence of the moral and material is beautifully indicated in a nature-nurture 'circle' – the artisan-built table is lodged in a tree – the material from whence it sprang, reflecting the struggle of Lily Briscoe to find a natural and true expression of herself and her art through her role as artist-artificer.

even, in *To the Lighthouse*, woman supporting the ribs, the thighbones of his vanity – remains in place. Whilst it must be admitted that no one may exist in a vacuum and we are all, inevitably, the creatures of our time and place, it may be surmised that a concomitant degree of disinterest in the juristic question could not be achieved whilst similar furniture remained in place for their Lordships.[36] Add to the *possibility* of a table, a room, existing *unperceived* the notion not simply of the *absence* of the perceiving individual but of mortality, of *extinction* and you have a humbling relegation of the thing-perceiver or the law-perceiver indeed.

This notion of the de-centred, marginalised perceiving subject may seem artificial but historically has been the locus usually occupied by women. Perhaps this is in part why Woolf can part reason, part *sense* her way to so radical an integration of the philosophical question with art.[37] The danger lies in a too-ready conclusion that Woolf as woman has a more 'instinctive' (and therefore, so the argument might run) less 'rational' approach to the philosophical problem, leading rapidly to an 'essentialist' model of the female and male intellects. Similarly it might be argued that Woolf – with her comic and playful subversion of the 'table' image, suspended in a pear tree – is mistrustful of theory and aligning herself in the material, another 'gender essentialist' trait sometimes ranged at (even claimed by!) feminist and women scholars. Such conclusions should be resisted, since at heart Woolf offers a caution to the centred – and apparently omnipotent, immortal – perceiving subject.[38] The caution might also have been useful to jurists, had they been ready to hear it: that the arrogation of a centred and iconic subjecthood, in relation to the world of things and people occludes not only the quest for the nature of reality, but for disinterested justice. It was not until the Peerage Act of 1963 that hereditary peeresses were permitted to become Members of the House of Lords.

Surely we can maintain a sense of equilibrium, a vision of 'the lighthouse' even though we know that institutions can be overly fetishistic or iconic, that there is no ultimate object to give credence to our existence – other than ourselves, and a modest view of community.[39] For Stephen Dedalus, the community is almost dead, except in the

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36 Marder ((1974), pp 134–35) demonstrates Woolf's clear playfulness with icons:

> … another aspect of the lighthouse image. 'It's the continuity', said Richard sententiously. A vision of English history, King following King, Prime Minister Prime Minister, and Law Law had come over him while his wife spoke. The suggestion of rigid order and succession, the profusion of capital letters, the words 'King', 'Prime Minister', 'Law', establish a connection between Clarissa's light burning over the House and the masculine principle … Another association of the lighthouse is suggested by another platitude … reading metaphysics. 'It's the philosophers, it's the scholars,' he rhapsodizes 'they're the people who pass the torch, who keep the light burning by which we live' … The lighthouse is associated with intellectual discipline, order, rationality …

37 This reading of Woolf positions her as a champion of the integral role of community in the life of the individual – the 'death of the individual' an ethical assertion rather than conceit, in contradistinction to former readings of Woolf (eg, see discussion in Conrad (1987), p 576).

38 David Lodge comments (Lodge (1979), p 179):

> In short, Virginia Woolf's modernist insistence on the relativity and subjectivity of experience undermines the redeeming power of the privileged moment …

39 Through the postmodern lens, feminist theory – whether essentialist or non-essentialist, is susceptible to its own form of gender parochialism and, in rejecting all that has gone before, a descent into relativism. In critiquing Smart, eg, Sandland, quoting Harding, notes (Sandland (1995), p 14):

> Smart's position can properly be described as 'a kind of absolute relativism' which refuses to deploy any normative base, as to do so is to deploy Truth …

clearly fearing that the attempt to be 'value neutral' comes close to a value vacuum. A potent feminist critique of Rawl's veil of ignorance has already been conducted by Seyla Benhabib in her essay *The Generalised and the Concrete Other* – that the Rawlsian law maker cannot escape his identity – that the 'original position' carries his latent prejudices, that the abstraction of the position is ... [cont]

pursuit of a mythological community of Ancients. In *To the Lighthouse*, the balance between self and community is approached as an issue of delicacy, in concert with the abstract struggle between subject and object. Both are fleeing from the determinist grip of social and intellectual feudalism, a feudalism epitomised by their Lordships in *The Viscountess Rhondda's Claim*:

> The holder of a peerage dignity who is a minor is not entitled to receive a writ, but he may grow up and will then become so entitled. A felon (Forfeiture Act 1870) or a bankrupt (Bankruptcy Act 1883) is not entitled to receive a writ, but a felon may receive a pardon and a bankrupt his discharge. These things are possible in nature and permissible in law; but a person who is a female must remain a female until she dies ...

POSTSCRIPT

In a later, polemical text by Woolf, a direct socially grounded challenge to the mindset behind *The Viscountess Rhondda* decision is erected by the linkage of gender inequalities and feudal tradition. In *Three Guineas*, written in 1938, Woolf asserts of women (p 121):

> Inevitably we look upon societies as conspiracies that sink the private brother, whom many of us have reason to respect, and inflate in his stead a monstrous male, loud of voice, hard of fist, childishly intent upon scoring the floor of the earth with chalk marks, within whose mystic boundaries human beings are penned, rigidly, separately, artificially; where, daubed red and gold, decorated like a savage with feathers he goes through mystic rites and enjoys the dubious pleasures of power and dominion while we, 'his' women, are locked in the private house without share in the many societies of which his society is composed ...

In reviewing *Three Guineas*, Quentin Bell wrote that its principal weakness lay in the:

> Attempt to involve a discussion of women's rights with the far more agonising and immediate question of what we were to do in order to meet the ever growing menace of Fascism and war. The connection between the two questions seemed tenuous and the positive suggestions wholly inadequate (Quentin Bell, quoted in Leaska (1998)).

In a sense, Bell was right; the linkage *does* seem tenuous and indeed must have offended many sensibilities in the politically sensitive atmosphere of the 1930s. Yet Woolf was anticipating a linkage that would persist, not only for feminist theorists but for social commentators. Woolf describes a picture with:

> The figure of a man; some say, others deny, that he is Man himself ... his body, which is braced in an unnatural position is tightly cased in a uniform ... it suggests that the public and the private worlds are inseparably connected; that the tyrannies and servilities of the one are the tyrannies and servilities of the other ... we cannot dissociate ourselves from that figure but are ourselves that figure ... such will be our ruin if you, in the immensity of your

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39 [cont] vulnerable to inauthentic and false decisions on behalf of the insubstantial 'generalised other' (Benhabib (1993)). Yet even if we make him 'interactive', his subject 'concrete', we must still struggle for our vision of community in counterpoise with the autonomous subject. Roger Scruton suggests:

> Communities are not formed through the fusion or agreement of rational individuals: it is rational individuals who are formed through communities ... However complete we may feel in our solitude, the community is latent in our concepts and in the experiences that are shaped by them. The subjective viewpoint as we encounter it in aesthetic ... experience, is not a retreat from others, but a search for the community in which we are truly at one ... (Scruton (1994), p 494).

> public abstractions forget the private figure, or if we in the intensity of our private emotions forget the public world. Both houses will be ruined, the public and the private, the material and the spiritual, for they are inseparably connected … (Woolf (1938), pp 162–63).

For novelists too, this linkage would persist; as will be seen, it is a linkage which would exercise the energies of the law.

CHAPTER 4

THE 1940s – THE EMPTY WAR: GRAHAM GREEN'S *THE MINISTRY OF FEAR* AND ELIZABETH BOWEN'S *THE HEAT OF THE DAY*

INTRODUCTION

A contemporary traitor: William Joyce, 'Lord Haw-Haw'

> The courts ... tested an issue of how far the letter is divorced from the spirit ... But in the upper air above the courts it was argued whether the God with whom man can have a perfect relationship is the dream of disappointed sons imagining a perfect Father ... more real than reality. This other trial was not concluded ... (Rebecca West writing of William Joyce ('Lord Haw-Haw', tried in 1946); West ((1949), pp 220–21).)

Rebecca West's comment upon the case of William Joyce links seamlessly to the warning voiced by Woolf in *Three Guineas*. Impoverished ideological values occupy not only the individual, but through him inhabit and endanger the State and beneath his uniform lies the frail assemblage of disparate influences, identities; so very different from the rational, autonomous agent before the law. Of the 'ideological' William Joyce, who carried forward his father's divided and conquered Irish identity, West wrote:

> It would be easy to pretend that all his subsequent errors and misfortunes followed from this rupture with his Church, but in truth his religious revolt was merely one link in a chain of dissents which it was his life work to forge. It is the weakness of Imperialism that in a country occupied by a strange power no man can know the sweetness of conformity, can marry his will to the common will for happy ends. If he be at one with his fellow-countrymen he must be a rebel against the conquerors; if he be at one with the conquerors he must rebel against his fellow-countrymen ... (West (1949), p 79).

While of the 'individual' Joyce we learn:

> Only uneducated people accepted easily that he was learned; educated people were always astonished to hear that he had been at a University ... it was not only culture in the sense of book-learning which was inaccessible to him; it was also culture in the sense of the life of the people ... Like others who joined the Fascists, he disclosed the sickness that was rife among the obscure (West (1949), pp 80–84).

Against this unacknowledged context, the trial of William Joyce[1] was played out. In terms of law the case was from the outset uncertain. Joyce, although the holder of a British passport, was an American citizen of Irish descent; his subversive activities had been carried out beyond the realm.[2] His trial for treason was therefore founded upon questionable legality. Technically, the affirmation of his conviction in the House of Lords

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1 *Joyce v DPP* [1946] AC 347 (HL).

2 In the early part of the Second World War, in pursuit of his belief in Fascism as the future ideology for Britain, William Joyce had undertaken tasks on behalf of German intelligence, most famously as 'Lord Haw-Haw' – the crowing radio voice 'calling' from Germany with a stream of information, disinformation and persuasive commentary designed to shatter the morale of the British people in their war effort.

was founded upon the notion of reciprocity: the holder of a British passport may claim the protection of the Crown, and the Crown may claim the duty of allegiance. Nevertheless, it was a moot point argued strenuously on both sides. In terms of post-war national feeling, the decision might be characterised as almost unavoidable given the general antipathy towards Joyce created by his activities as 'Lord Haw-Haw'. Yet as Rebecca West reports, 'ground level' debate on the case was not without expressions of public disquiet that the conviction might represent a substantial injustice; that however hated, an American citizen could not be at one and the same time, a British traitor.

Though most of the majority judgement was taken up with a review of the constitutional history and lineage of allegiance and its correlation to the conception of individual and State claims and duties, there are at times references to the *particular* nature of the abuse perpetrated by the accused. In his judgement, Lord Jowitt first discusses the conceptual framework of protection and allegiance identified in the holding of a passport and continues:

> Moreover the special value to the enemy of the appellant's services as a broadcaster was that he could be represented as speaking as a British subject and his German workbook showed that it was in this character that he was employed, for which his passport was doubtless accepted as a voucher.[3]

For Lord Porter however, the case for the passport as unambiguous emblem of allegiance and identity is not made out; he believes that:

> ... a reasonable jury properly directed might have considered that the allegiance had been terminated ...[4]

– and the holding of the passport can be ascribed to a workaday, non-symbolic – and not particularly partisan – utility:

> Against the mere receipt of the passport there must be set the fact that its possession was at least desirable if not necessary to enable the accused man to proceed to Germany from this country, the fact that it was not found in his possession again nor anything further known of it ...[5]

The issues at hand were the mortal question of treachery, and the moral question of whether the mind of the accused in relation to the notion of allegiance was at very least deeply flawed. Both were underpinned by the third, ethical question of whether the locus of the State to the accused created standing more apparent than real, yet a large proportion of judicial energy was taken up with debating the technical status – and existence – of a passport. Whilst the conduct of the enquiry into facts in the light of legal principle thereby maximises neutrality, in the elision of the fundamental moral questions at hand the operation bears greater resemblance to blind elimination than enlightened enquiry. Lord Porter went so far as to imply that the judgement amounted to a flouting of the rule of law:

> If the safety of the realm in wartime requires action outside the ordinary rule of law, it can be secured by appropriate measures such as a Defence of the Realm Act, but the protection

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3 [1946] AC 347, p 371.
4 *Ibid*, p 381.
5 *Ibid*.

> of subject or foreigner afforded through trial by jury ... is never more important than when the charge of treason is in question.[6]

The justice of the decision as well as the manner of reaching it, is clearly impugned, yet arguably the essential elements of the case – on Rebecca West's reading – are not justiciable. The pragmatic purposes of the law, in the context not only of established legal principle, but principle overseen by the blood-letting of a showcase trial, could scarcely accommodate the combination of unstable identity and unstable ideology that *was* William Joyce, even had doctrine allowed (as it did for example in the case of Steane). Yet throughout, Joyce saw himself as a British patriot forced, by historical accident, to employ unusual means to further (what he perceived to be) British interests. With a *notional* conception of nationhood and patriotism as piecemeal as his *actual* nationality he embodied a collision between individual, ideology and fiction. Canovan's review of Hannah Arendt's 1951 text *Totalitarianism* clarifies the point:

> Arendt maintained that totalitarian movements with ideologies of this kind appealed to the 'masses', by which she meant people uprooted by the various upheavals of the 20th century. Lonely individuals who have lost their place in the world and seen their expectations defeated are liable also to lose their 'common sense', their capacity to distinguish between reality and fiction ... Totalitarian movements offered them a new community in which they could be at home, and a kind of alternative world that was more dependable than the real one (Canovan (1992), p 75).

How could the law possibly make this confluence of disruption, frailty, fiction and a search for 'home' justiciable? Yet if such confluence truly not simply motivated, but *formed* and *directed* the actions of such agents, what questions does it beg regarding the concept of 'free-will' and of the moral status of a law blind to such convergence of individual and ideology?

FICTIONS OF WAR AND TREASON

In the decade that spawned the case of *Joyce v DPP* (1946), two fictional models for exploring the moral status of transgressive individual action were born. In the first, Graham Greene's *The Ministry of Fear*, a convicted mercy-killer contrasts with the traitor to the State. In the second, Elizabeth Bowen's *The Heat of the Day*, a man of conscience, gentleness and ideals is a traitor, whilst the patriot is a calculating moral derelict. Both books explore moral questions in the unusual context of war and espionage, the very chaos inducing a re-examination of established values. The books share approaches to their ethical 'modelling'. The most significant is perhaps the conceptual – ethical and literary – device of 'inverted expectations' – is treachery more 'heartless' than murder? Can 'traitors' be creatures of moral purity, the 'patriot' an opportunist? Are such questions merely the product of their peculiar historical moment, or are they necessary in helping us to reformulate or re-examine moral and legal values? How do relations between, and depictions of male and female characters intersect with notions of the moral and the good? How does personal history converge with history as event and as ideology?

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6 *Ibid*, p 382.

History revisits the 1930s and '40s with foreboding – both decades were dominated by ideological upheaval, moral dessication and inhumanity – the 'ideals' which had driven ideologies became close to (sometimes indistinguishable from) the zeal of the fanatic. Scientists, artists, politicians and philosophers all in their way promoted or reflected an engagement with these developments. For Greene and Bowen, the period culminating in war prompted the production of texts which reflected upon the moral status of agents for such change.

THE MINISTRY OF FEAR

Beginning with the tension between virtue and vice personified in the intimate realm of the mercy-killer, Greene explores the tension between virtue and vice, 'good' and 'evil' obtaining in the broader realm of metaphysical values. The mercy-killer Digby questions his own motives, tortured in retrospect by the thought that he may have killed in a moment which *presented* itself to him as mercy towards his ailing wife, when in actuality the mercy was for himself. Knowing that one can be so 'trapped and betrayed by our virtues' in the *personal* sphere, Digby re-examines the currency of values in the public sphere and in the abstract framework of metaphysics.

Using the example of a *mercy*-killer to shed light upon the moral status of a traitor appears to evade the full potential jurisprudential impact of the question Greene is attempting to explore. Contrasting the moral status and agency of a more *conventional* murderer with a 'traitor' would have forced a re-examination of the assumptions underlying use of such nomenclature – at first blush the word 'murderer' might conjure a more horrified recoil than that of 'traitor'. Greene does attempt to disrupt such reflexes: 'Your old fashioned murderer killed from fear, from hate – even from love … (p 47).' Yet this foray into the potential fluidity of motives in 'conventional' murder is brief.[7] For the most part, the critique of the concept 'murder' is tied to an opposition between the humane potential of the 'mercy-killer' and the *inhumanity* of the enemy, the agent of ideology, the traitor:

> You have to be prepared these days for criminals … everywhere. They call it having ideals. They'll even talk about murder being the most merciful thing … the Prussians. Or the Nazis. The Fascists. The Reds. The Whites (*The Ministry*, p 48).

The comparison between 'mercy-killer' and 'traitor' therefore seems a 'soft' option, using an atypical killer, easily humanised. Neither does Greene exploit the example in the alternative, challenging orthodox expectations, juxtaposing 'mercy-killer' with 'traitor' for a (potentially) shared characteristic – that both act for 'conscientious' reasons.[8] Thus, beginning with an unusual ethical model, the mercy-killer / traitor contrast, Greene fails to

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7 From the point of view of criminal jurisprudence such exploration would have been apposite: the notion of 'characteristics' in a 'reasonable man' who kills would soon begin a new path.

8 The theme was clearly stimulated during the period up to and including the war (Annan (1991), p 249):

> … dramatic to the young was the line which Auden was later to repudiate, 'The conscious acceptance of guilt in the necessary murder'. Orwell took that line to mean acceptance of the Marxist doctrine of 'objectivity' – a murder is not a murder if objectively it can be shown to be a necessary act in the struggle to establish the dictatorship of the proletariat.

exploit its potential, tending instead towards 'predictable' stereotypes, stereotypes promoted by a rigid public/private moral 'split' and adopted as such by the law. Indeed even in its fully explored state, the model would bear poor fruit as a tool for exploring moral or ethico-legal questions: the law already takes note, albeit imperfectly, of the moral background to individual acts of killing and any failure to do so in relation to treachery will not be resolved by the contrast or juxtaposition of the individual (as opposed to 'ideological') crime *per se*. Nevertheless Greene is here groping towards an important philosophical critique – considering whether any value-systems can remain incorruptible.[9]

THE ELUSIVE NATURE OF VIRTUE

> A murderer is regarded by the conventional world as something almost monstrous, but a murderer to himself is only an ordinary man. It is only if the murderer is a good man that he can be regarded as monstrous … (*The Ministry*, p 88).

Although the ethical *model* raised by Greene does not explicate the conceptions inherent to stereotypes, the text nevertheless succeeds as a vehicle for the exploration of assumptions concerning practical virtues. Greene recognises the role played by 'practical' virtues as template for moral identity. As Scruton explains ((1994), p 294), though:

> Aristotle emphasised the intellectual life as the highest and happiest, and the intellectual virtues as the most valuable. His argument is more plausible however, if we consider the practical virtues: in particular those of prudence or practical wisdom (phronesis), courage, temperance and justice. We all have reason to acquire these virtues; in acquiring them we acquire emotional dispositions; and from these dispositions spring the motives of our actions.

Yet Greene doubts the presumptive metaphysics of such virtues, aware of their powerful and plastic iconography. Although the novel locates the expression of moral decline in the particular time, there are of course reverberations with other moments of history where political/ideological 'decline' or change has facilitated new forms of social and moral disintegration and indeed the hypothesis begs the question, whether disruption simply reveals rather than creates, such exploitation. The key suggestion appears to be that secular ideology, being mechanistic, an adjunct of 'scientism' and utility, links directly with the decline in social values.[10] The 'good man/murderer/monstrous' link makes a

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9 Adamson ((1990), p 73) identifies this as a 'liberal' dilemma:

> Although Rowe's ostensible problem is his inability to adjust to the burden of guilt he bears from his mercy killing, his nightmare is broader and encompasses the moral dilemma of the liberal. Rowe is the good man caught up as he tries to see every side of all issues and behave decently in a world where the old values are smashed and most of the new ones are unacceptable.

10 Nevertheless, 'utility' was arguably also the hallmark of Greene's relationship with religion. As Michael Shelden explains (Shelden (1994), p 127):

> What one finds in his work is an eccentric mixture of simple but powerful assumptions: God is tyrannical, the soul must assert its independence, sin can have its charms, easy virtue can corrupt, evil can be overwhelming, and damnation can be a noble act of defiance. What Catholicism gave to all this was the right background. It gave him rules to break and props to knock over. And that was a lot. The Catholic Church was an enormous edifice that could sustain heavy assaults without collapsing. He could subject it to one indignity after another, turning its good points into bad ones, making its God a devil, and Lucifer a saint … and in the end, the Church would have to forgive him, because that is what the religion is all about.

more fundamental point, all the more disturbing for its apparent incongruity.[11] Moral dereliction, even parasitism is always likely to appear in the wake of social and political upheaval. But the notion of 'the good' being 'truly' monstrous strikes at the very heart of our understanding of moral life. This disruption is informed by other comments: 'That sense of pity which is more promiscuous than lust …'; 'what had come over him was the horrible and horrifying emotion of pity …'; 'Courage squashes a Cathedral, endurance lets a city starve, pity kills – we are trapped and betrayed by our virtues …' – Greene is challenging the entire ethico-moral framework. For if 'pity' is promiscuous – horrifying, a killer, and 'virtue' a source of betrayal – as a comprehensive reading of motives through history must conclude – how can we ascertain not simply the boundaries, but the content of 'the good'? In recent times, the philosopher Bernard Williams has discussed the status of such concepts in the philosophy of ethics and their potential for metabolisation when their significance in the philosophy of language becomes separated from the philosophy of ethics. Williams locates these as 'thick' concepts, which appear to bring about a convergence of fact and value:

> What has happened is that the theorists have brought the fact-value distinction to language rather than finding it revealed there. What they have found are a lot of those 'thicker' or more specific ethical notions … such as *treachery* and *promise* and *brutality* and *courage*, which seem to express a union of fact and value … fact-value theorists who rely on linguistic means are bringing their distinction [between fact and value] to language rather than finding it there and, in addition, are unreasonably expecting that when the distinction is revealed it will be found very near the surface of language. There is no reason to expect that to be so. If we are engaged in a fraudulent or self-deceiving business of reading our values into the world, our language is likely to be deeply implicated … (Williams, B (1993), pp 129–30).

Greene confirms that the fraud or self-deception are both deeply persuasive and recognises that such 'thick' concepts may be brought into the service of good and evil alike: where Bernard Williams theorises the 'local' and 'cultural' epistemologies of such values, Greene recognises the potential to extend back outwards in the political and ideological, his story an allegory for the moral maelstrom faced by workaday man.

Greene's choice of a convicted 'mercy-killer' places his criminal of the private domain at the 'soft' end of any notional spectrum of murderous individuals. This permits contrasts to be drawn with the 'ideological' offender, whose ideology – the text implies – replaces his humanity. Greene's comparison of the murderer with the traitor promotes the proposition that the key difference between the two is one of degree rather than nature. Criminal law rarely concerns itself with exploring such comparisons, bound as it is to strict *definitions*, to delineation of discrete wrongs, to discrete inductive inferences which are bound to pragmatic rather than broader philosophical concerns. Greene's model appears to place him more firmly in the role of broad jurisprude – as with all his novels, he is here concerned with how we conceive of notions of the good, of the problem of evil.

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11 The link has been suggested in many literary texts: Greene reflects, more consciously than most, the language-to-concept fissures in metaphysical virtues for inglorious man.

For the criminal law, the potential for such links within doctrine is weakened with the severing of intention and motive and the separation of public and domestic life.[12]

The law's reasons for categorising the traitor quite separately from the murderer are practical – although both may cause death, one commits his crime against the individual, the other against the State. In treating the 'murderer' with sympathy, bestowing him with frailty, guilt, doubt, Greene attempts to disrupt and explore our usual understanding of the spectrum of evil agency. He suggests 'murderer' – not so bad, 'traitor' – much worse, possibly tapping into the ethical maelstrom intensified by propaganda and war. Consequentially this may be true – a traitor can cost many lives, a murderer usually few. In doing so, Greene attempts to indicate the moral basis of these assumptions: that the 'murderer' is the creature of malice aforethought, whilst for the traitor, causing death is a secondary result, a by-product of a primary motive, which is political, ideological. This is of course, precisely the basis of the claim made by terrorists/freedom fighters for political status, yet the ethical model seems weak. Neither consequential nor deontological questions can be resolved purely through this kind of opposition: the 'consequential' harm caused by a killer may, potentially, be as great as that caused by the traitor, depending on the facts: the effects upon the hardening of social values, or the desecration of social norms may have broader significance than a simply statistical account of those harmed might suggest. Consequentially, it is possible that the act of a traitor may yield some positive goods for a community where the community values are flawed (and this may be the genuine motivation of the traitor). Similarly, crude deontology would relegate both crimes as wrongs, since both offend against Kant's categorical imperative; both treat people as means to an end rather than ends in themselves. Yet, this apart, the pursuit of a competing *ideal* might go some way to 'mitigate' or even neutralise the offence against some other 'absolute' value. Greene's model of contrasting wrongdoers yields little in the exploration of these questions.

Both Greene and Bowen recognise that the very concepts of state and nationhood as sources of 'patriotism', of identity, is by the late 1940s imperilled, assaults upon them plausible. Greene's thesis is perhaps directed by his Catholic anxiety – if God is removed from the identity with Man and with State, all moral propositions are disturbed – worship of atheistic ideology endangers the notion of sanctity – secular or divine. The ideological cause is inhuman *because* it is misguidedly rational and mechanistic – an expression of existential nihilism. The 'simple' murderer by comparison is a victim of human frailty, of passion rather than reason (such a model fails to acknowledge however that 'religious' wars are just as rooted in uncompromising and prejudicial ideologies; the opportunism just as calculating as that displayed by certain killers). The 'ideological' motive is portrayed as an appeal to ego – an exclusive community above State: 'It's intellectuals like ourselves who are the only free men. Not bound by conventions, patriotic emotions … we haven't what they call a stake in the country…' As history demonstrates, 'ideals' are corruptible:

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12 Yet at the time, an odd form of moral 'economy' operated between the spheres – Zabel writes ((1973), p 33):

> Greene, dealing in a 'whole barbarism' equalling or surpassing anything in history, has undertaken to redeem that dilapidation from the stupefying mechanism and inconsequence to which modern terrorism has reduced it. Arthur Calder Marshall has rightly said … that 'few living English novelists derive more material from the daily newspaper than Graham Greene'.

> You have to be prepared these days for criminals – everywhere. They call it having ideals. They'll even talk about murder being the most merciful thing … the Prussians. Or the Nazis. The Fascists. The Reds. The Whites … (*The Ministry*, p 48).

With God now a source of moral ambiguity, perhaps a central source of the crisis of the time ('The missal was ornamented with ugly coloured capitals; oddly enough it was the only thing that spoke of war in the old quiet room …' (p 74)) and Mammon in place of God, moral corruption becomes embedded – even lionised – in the social network. Greene is positing a profound moral paradox in recognising the danger of a society and law which no longer monitors the link between moral responsibility, status and the law; his examples are provocative:

> In these days it really pays to murder … the rich abortionist becomes a gynaecologist and the rich thief a bank director … Your old fashioned murderer killed from fear … Canon Topling wouldn't do that. If he killed his wife he'd lose his preferment … (pp 46–47).

The quotation reverberates with Woolf's prediction. Canon Topling and his ilk are icons for the locus of privilege and ethical decay which is ripe for the ideologically myopic transformations of William Joyce. 'Canonisation' in public life cannot disguise entirely the moral dereliction of the private self. Woolf warns that the *littleness* of the private man, his *domestic* 'fascism' in all forms cannot be separated from the ethical failure of his public self and that both public and private realms are imperilled. Through the text, Greene adds to this observation his doubt regarding the discriminatory power of social ethics and indeed our ability to identify the very notion of virtue.

Does Greene pose a challenge to notions of virtue or simply their accessibility? Certainly the assertion that 'conventions were far more rooted than morality' (p 71) indicates not only that the moral framework is *unstable* but also *subordinate*. The review of notions of 'goodliness', 'virtue' – and the *role* of virtue – questions the deontological, whilst scepticism of political ideology doubts the link between 'ideals' and consequences: 'virtue', according to point of view, may motivate the ideological *and* the personal transgression. The position of the law is perilous. In judging and mediating 'collective' and individual sources of action – when both may contain 'moral' and 'transgressive' interpretations, law is naturally drawn to embrace that expression of 'virtue' best serving the State. Yet with virtues uprooted from their usual metaphysical base – with courage smashing a Cathedral, a pity that kills, their potential for *political metabolisation* is underscored. Ideologies are exploitative *because* they are abstract and mechanistic – because of their *form* as much as their content. By the 1940s, much violence had been done in the name of virtue, just as the mediaeval crusades had shed blood in the name of God. Such fundamentalist action continues to be potent because of its claim, not just upon political, religious or national identity but upon the basic individual need for a positive selfhood, as Rebecca West indicates. Like the law, the individual agent is susceptible to an 'appeal to his virtues, his intellectual pride, his abstract love of humanity … One can't love humanity' (p 184). Concluding that 'knowledge was the great thing … not abstract knowledge, but detailed passionate trivial human knowledge' the figurative opposition of ethical values with which the novel has grappled collapses, pleading for a return to a cave/womb/particular/personal locus as the only position of wisdom or trust.

DOMESTIC HISTORY, 'FABULAR' HISTORY, HISTORICISM

Having considered the links – and failings – shared by 'inner' morality and 'public' ethics in the apparently autonomous, 'mature' moral agent, Greene considers how the agent came to being. Though his fictive ethical modelling does not extend to consideration of workable parallels in the formation of the 'traitor' figure, who remains austere and inscrutable, he considers the peculiarly *petit-bourgeois* English values shaping the formation of the individual, taking several approaches to the getting of history. Uncannily echoing the later writings of Ballard, the protagonist Rowe revisits his childhood, the world of Trumpington and cucumber sandwiches; not only inadequate in providing a workable moral education, but discrepant:

> ... a long hot road near Trumpington, scuffing the white chalk-dust ... tea ... behind the red-brick wall ... a bright blue croquet ball lay at her feet ... He was saying 'Mother, I murdered her ...' and his mother said 'Don't be silly, dear. Have one of these nice sandwiches'... She could tell him it didn't matter and it would matter no longer ... but she called out in a vexed voice ... 'you *must* remember to dust the piano'... (p 63).

Arthur Rowe is not simply himself, but the embodiment of an historical paradox – that the creature of innocence, of cucumber sandwiches – the pre-war world, is the creature of present wrongdoing; and though his mother is a source of love and approval, the domestic mythology and her deaf domestic preoccupation inform the paradox. Throughout the book, the mythology of *prevailing virtue* in children's literature – *The Little Duke* in particular – is also crucial to the 'unpreparedness' of Arthur in comprehending his own and others' moral agency.[13]

This vision is enhanced in a dream fable which this time reflects the entire social fabric of preceding decades, from:

> ... the familiar peaceful faces – the chemist and his wife, the daughters of the headmaster, the bank manager and the dentist with his blue chin and his look of experience, the paper streamers of blue and green and scarlet, the small local orchestra, the sense of a life good and quiet and enduring ...

to:

> The music had stopped, the lights had gone, and he couldn't remember why he had come to this dark vile corner, where even the ground whined when he pressed it, as if it had learnt the trick of suffering. He said, 'Please let me go away from here', and the policeman said, 'Where do you want to go to, dear?' He said, 'Home', and the policeman said, 'This is home. There isn't anywhere else at all', and whenever he tried to move his feet the earth whined back at him: he couldn't move an inch without causing pain ... (p 67).

The whole trajectory of preceding decades – the eternal village 'good' life quiet and enduring, peopled by the reassuring characters of social stability – collides with the

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13 This could be construed – in parallel with the reception of much modern media representation – as an inability to distinguish appearance from reality. Contrast Kipling, who:

> ... saw his school as a microcosm of society. To survive in it as individuals boys have to learn how to exploit the social system in which they exist. The secret is to learn the difference between appearance and reality ... (Annan (1991), p 61).

nightmarish vortex of the present.[14] Not only is this a reflection of a personal present, in which Rowe, the mercy-killer, is tortured by the conflict between his erstwhile innocence and the reverberations of later actions, it is a fable indicative of the social breakdown which exposes the frailty of engagement between the psychical and the physical world, where 'home', the woman's voice, even the very earth, are shattered concepts offering no haven; and the mere act of movement inflicts pain which seems to reverberate through the universe. This chaos is linked to the old stability and produced by it; it is the existential moment stripped bare. The passage wonderfully evokes the human product of Woolf's 'inseparable' public and private worlds; the psychological experience of the 'lost' individual of Arendt's political analysis, the collision of reality and fiction in the psyche, of the search for community.[15] Such collision erupts in the *reality* that is the case of William Joyce.

Just as Arthur Rowe perceives history as divisible into two eras, before and after personal and political decline, so *The Ministry of Fear* itself is divisible into two parts, with Rowe's identity extinguished (by amnesia) and replaced by 'Digby'. 'Historicism' – the theory that social and cultural phenomena are determined by history – becomes a critical moral issue in wartime: is the present crisis a product of human failings, or of events? The issue poses a moral question for society and its constituent members, of whether human will, or the contingent event, directs the moral life. The worlds of theory often occupy an apparent historical vacuum; the worlds of persons may be similarly disengaged, selecting values according to a personalised mythology. With 'Digby's' access to people and information severely controlled and curtailed, with little or no memory of the past, this section of the novel is a comment not only in the practices of brainwashing, surveillance and propaganda, but also an experiment in ahistoricism, of the process of coming to consciousness and knowledge in a near-vacuum of information. Again, there are hints of reflexivity in this section, for not only is the process a comment on the getting of individual wisdom, simultaneously it reflects upon the link between this, and the creation of ethical life, of collective wisdom, collective 'history'. Returned by amnesia to a child-like naivety, Digby views the world again – as in his 'real' childhood, with an illusory simplicity and happiness. Easily manipulated by those around him, the political world is veiled by the domestic; moral chaos disguised by domestic order. The citizen-subject, the

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14 This reflected a particular social class perspective. Of a propaganda film involving Greene, Adamson explains (Adamson (1990), pp 74–75):

> The film may have had its effect as wartime propaganda but it vastly oversimplified historical circumstance. There was no mention of the General Strike, the Depression, the mass unemployment that tore at British society in the twenties and thirties, or of the ideological struggles that engaged its politicians, artists and intellectuals. Greene's commentary presented England between the wars as a Utopia …

15 Aristodemou neatly summarises the connection indicated to myth and dreams ((2000), p 30):

> … for psychoanalysts, myths can express a society's unsatisfied, repressed, or unacceptable desires: if dreams are the royal road to an individual's unconscious, myths express a society's collective unconscious …

However, her continuation that:

> … and just as the blocking of the unconscious by the ego leads to individual neurosis, so the blocking of collective desires leads to collective neurosis and the maintenance of a discontented civilization,

takes the analogy further than the present writer would wish, not least because an unmediated reference to the dangers of 'blocking collective desires' needs qualification: collective desires may reflect extremely unpleasant features.

moral agent is managed and assuaged by social constructions which appeal to the search for security. Canonical texts form a critical influence in such constructions: *The Little Duke* fathers the little man, the little man must reconstitute himself in the light of ensuing texts. A vulnerable moral template, the amnesiac Digby encounters the texts of adulthood; Rudolf Steiner, Freud, Tolstoy's *What I Believe*:

> *Remembering all the evil I have done, suffered and seen, resulting from the enmity of nations, it is clear to me that the cause of it all lay in the gross fraud called patriotism and love of one's country …*
>
> There was a kind of nobility in the blind shattering dogma, just as there was something ignoble in the attempt to rub out the pencil-mark. This was an opinion to be held openly if at all. He looked farther up the page: '*Christ showed me that the fifth snare depriving me of welfare is the separation we make of our own from other nations. I cannot but believe this, and therefore if in a moment of forgetfulness feelings of enmity towards a man of another nation may rise within me…*' But that wasn't the point, he thought; he felt no enmity towards any individual across the frontier: if he wanted to take part again, it was love which drove him and not hate … The old man in the beard, he felt convinced, was wrong. He was too busy saving his own soul. Wasn't it better to take part even in the crimes of people you loved, if it was necessary hate as they did, and if that were the end of everything suffer damnation with them, rather than be saved alone?[16]

Thus, 'Digby' is reapprised of the world of moral and political paradox; the 'tabula rasa' glossed with a discomfiting glimpse of conflicting principle. Digesting Tolstoy's indices, Rowe fails to remember the alienating power of nationalism in general – which accounts in large part for the ideological battle raging 'outside' the 'ahistorical' nursing home – even if his surmise about his own motivation by more personal forces is correct. Nevertheless in doing so, Rowe personifies a fundamental question regarding the moral agent: whether the very notion of abstract virtue becomes muddied and subsumed by our personal relations; that perhaps the entire conception of 'deontological' values is destabilised by a more elemental conception of intimate human loyalties. Whilst in the nursing home, Rowe/Digby comes across a contrasting 'pool' of potted ideology – one easily digested by the not-so-literati, appealing to the emotional as much as ethical needs of the individual. It is the nurse/'minder' Poole's room, containing 'a shabby collection – Carlyle's *Heroes and Hero-Worship, Lives of Napoleon and Cromwell*, and numbers of little paper-covered books about what to do with – Youth, Labour, Europe, God'. So the acolyte of ideologies is placed (both for Digby, and for the reader) and Digby concludes 'there was so much of the past he had to learn that he couldn't be bothered to learn the criminals, at any rate of the domestic kind'. Again, the foregrounding of history written for public 'consumption' is offset by the failure to link to the 'private' world, to the criminal, the domestic. Not only is this is an irony for Digby, who by learning 'the criminals' might stumble across himself, it is a comment on the getting of history generally, of the perhaps spurious and random melding of 'the big' at the expense of a – potentially just as significant – 'small'. This possibility of significant 'randomness' as against an illusory cultural order is part of the puzzle that informs the 'ahistorical' perspective:

16 *The Ministry*, pp 131–32, original emphasis.

> Life can be very odd ... you should read more history. Silkworms, you know, were smuggled out of China in a hollow walking stick ... I thought life was much simpler and ... grander ... Captain Scott, Oates, Damien among the lepers ... *The Book of Golden Deeds, The Little Duke* ... (p 62).

Woolf's prediction reverberates throughout, from the 'fables' of history, to inner 'ahistoricism'.

THE HEAT OF THE DAY

> Their time sat in the third place at their table. They were the creatures of history ... War at present worked as a thinning of the membrane between the this and the that ... No, there is no such thing as being alone together ... (Elizabeth Bowen, *The Heat of the Day,* pp 194–95.)

Just as Greene's approach to the moral questions revealed by the moment of war can be crystallised in terms of the moral agent in the 'civic' context (whether 'killer' or 'traitor') *and* in the domestic context, so Bowen formulates a similar exploration of the link between public agency and the private expression and/or origins of such agency and, as the quotation above suggests, the location in history, in time. In *The Heat of the Day,* the 'civic' question is explored not through the 'killer/traitor' spectrum or opposition, but through the development of two characters – the 'traitor' who is motivated by 'pure' ideals and aspirations, contrasted with the patriot who is motivated by opportunism (p 33): 'War ... hasn't started anything that wasn't there already – what it does is, put the other lot of us in the right.' The feasibility of these positions is confirmed through detailed development – Harrison, the patriot attempts to exploit the power obtained through his knowledge of treasonable activity by attempting to blackmail Stella, the narrator and central figure in the story, into engaging in an affair with him, so that she may 'buy' protection for her lover Robert. Harrison is a man who lacks subtlety, depth, who makes choices for their practical rather than moral value. Robert, in contrast, is profoundly engaged with the philosophical and political implications of his times: 'Country? – there are no more countries left; nothing but names' (p 267); 'Betrayal ... don't you understand that all that language is dead currency' (p 268), and concludes with the assertion:

> ... freedom's inorganic: it's owed at least to the few of us to have a part in strength. We must have something to envisage, and we must act, and there must be law. We must have law – if necessary let it break us: to have been broken is to have been something.
>
> But law – that's just what you break.
>
> Nothing I can break is law!

Unlike the 'traitor' depicted by Greene, Robert is a man not driven blindly by the promise of ideological change, but reasoning his way towards it. The vehemence of his belief in 'law', juxtaposed with his assertion that his espionage contributes to the breaking of something that is not law, demonstrates that, whether misguidedly or not, he is a person who believes that his actions will contribute to the building, not only of a new order, but a morally superior order. Clearly, any 'extremist' might assert 'Nothing I can break is law!' and believe that he is helping to create a new and superior order; with the character of

Robert we have at least strong indications that his assertion is founded upon a reasoned belief that the status quo is corrupt and therefore that he is striving for a *moral* transformation.

In addition he is not the stereotypically 'cold blooded' ideologue of propaganda myth, but a man who is entirely morally conscientious in the detail of his private life: this contrasts starkly with the opportunist patriot. Together, these depictions of the traitor and the patriot raise an additional issue: how should our view of the moral agent be affected by significant inconsistency in the comportment of other areas of his life? Numerous examples could be cited and indeed it would be difficult to demand utter consistency in the public and private life of each individual, if only because life involves a learning trajectory and the need to adapt to the contingent.[17] Is the ethical status of moral positions diminished by the failure to 'live' them, or do we judge their viability simply in terms of their rationality? The central distinction when comparing the texts of Bowen and Greene is that Greene depicts a world of moral relativity which collapses into moral stereotypes, whilst Bowen performs the more adroit exercise in ethics, inverting the moral stereotypes themselves.[18] Whilst Greene's text suggests the underlying ethical question 'how may we chart our way forward when the very values of metaphysics may be called into question, perhaps revealed as utterly unreliable?' – a question with deeply disturbing implications, Bowen adds 'and what does it mean to find that he traitor is not a stereotype but a man of principle, virtue, of morals?'.[19] That the status quo may represent a moral failure is not explored in terms of an analysis of social inequality or political corruption in *The Heat of the Day*. A creeping dystopia is hinted at, in the depiction of a British propaganda machine at least as calculating as that of the enemy. Through the vehicle of a minor character, a young uneducated girl (whose identity and belief system is entirely sculpted by her ignorance of politics and the credible propaganda of the media) we see a citizen shaped *not* by moral values but by emotional consolation:

> Louie, after a week or two on the diet (of newspapers) discovered that she had got a point of view, and not only a point of view, but the right one. Not only did she bask in warmth and inclusion but every morning and evening she was praised … here she was in the

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17 Nevertheless, examples of flagrant inconsistency may be cited: whilst asserting that the family is the most basic and fundamental unit of civic life, Jean-Jacques Rousseau, the author of *The Social Contract*, despatched each of his infant children – sired on his servant-mistress – to the local poorhouse.

18 Though a product of Anglo-Irish privilege, Bowen's sensitivity to nuance was reflected in her practical contribution to law reform:

> Bowen … had been appointed, one of two women, to serve on the Royal Commission on Capital Punishment, and the work – involving not only constant meetings and discussions and studies of the MacNaghten rules and insanity laws … continued for over two years … 'Every member of the Commission developed some personal line in their approach, and I myself brought in my particular point, which was that only physical provocation counts as provocation which can turn murder into manslaughter or make it just another homicide. And it may have been either as a writer and an imaginative person, or as a woman, that to me continuous mental torture is equally provocative … We recommended the inclusion of verbal provocation …' (cited in Bowen (1975), p xxxiii).

19 Lee ((1999), p 173) suggests a possible link between the case of William Joyce and Bowen's text:

> Bowen may well (at the same time that West was writing *The Meaning of Treason*) have been influenced by Lord Haw-Haw in her creation of Robert Kelway as a pro-Nazi, not a pro-Soviet spy. But the difference between *The Meaning of Treason* and *The Heat of the Day* is not only that between fact and fiction. Rebecca West makes it clear that William Joyce was an eminently dislikable person; Bowen, though, has tried to make us like Robert Kelway … This involves a political and moral difficulty as well as an aesthetic one.

> forefront of the industrial war drive. As for the Americans now in London, they were stupefied by admiration for her character. Dark and rare were the days when she failed to find on the inside page of her paper an address to or else account of herself ...(p 152).

This relation between apparently objective fact and subjective construction is satirised:

> Still, you'd surely not rather be like the Germans, Connie? I was told how they swallow anything they are told. I know I saw where it said how they do have papers, but not like our ones with ideas ... (p 154).

Most attention however is given over to the 'domestic' site of moral decay; again it is in the domestic sphere that the civic failure (in a society where the text asserts the 'vacuum as to the future was offset by the vacuum as to the past' (p 95)) is most in evidence. In accord with many of the 'real' cases of treachery of the period, Bowen identifies the moral decline squarely with an educated, privileged, yet morally debased bourgeoisie: nor is the identification merely symbolic, but anatomised in detail. Robert's family have lived, variously in country homes named 'HolmeDene', 'Fair Leigh', 'Elmsfield', 'Meadowcrest' – archetypically English heartlands, comfortably appointed. Yet that comfort has deadened their hearts: 'Do stop thinking you're making a bad impression; I assure you you're making no impression at all,' and Robert's resultant disaffection stems from this deathly vacuum – as with Antigone, it is the fundamental split between a failure of civic values and the resurgence of primordial, 'natural' fidelity:

> Not only nothing to hold, nothing to touch. No source of anything in anything. I could have loved a country, but to love you must have – you have been my country ... (p 273).

It seems more than mere coincidence that this quotation reflects so completely the doubt expressed by Rowe/Digby on reading Tolstoy – that it is not enmity towards another country, love towards a country which drives the moral agent, but the 'conditions precedent' of personal relationship and personal affirmation.

Fundamentally, Bowen identifies an additional factor in the positivist jurisprudential equation concerning the separation of law and morals: that civic propriety, civic life as reflected in private, may dangerously ape the preservation of values when all that is preserved is convention. Positivists have responded in part to this challenge, posed in terms of the technically recognisable, valid and consistent legal system which is nevertheless morally debased. For example, it is argued that this raises two separate questions – what is a valid legal system? (a value-neutral question answered by the mechanisms of the positivist test) and what is a good system? (a value-laden question). Bowen is adding to the sophistication of the challenge however, suggesting that certain highly developed, perhaps even ethically irreproachable and consistent systems and cultures may actively suffocate the moral life. The cultivation of formal 'propriety' above other considerations is fatal. It is another approach to Greene's contention that convention may supersede morality:

> She saw the Kelways suspended in the middle of nothing ... Always without a quiver as to their state. Their economy could not be plumbed: their effect was moral (p 114).

The bastion of social convention is so complete that it is an impenetrable 'economy' and, most dangerously, subverts the possibility of critiquing moral content by creating a moral 'effect'.

MEANWHILE, BACK AT THE CAVE: THE ROLE OF WOMAN

If the public and private man, public and private values, are mimetic, how do they inform relations between the sexes? For Greene, women are adjuncts. Rowe's mother has been ascribed some (at least nominal) role in the failure of domestic culture: she personifies 'denial' – through gentility and the mythology of childhood – cucumber sandwiches, *The Little Duke*, although whether she is *promoting* or simply *reproducing* such a stance remains unclear: at the very least she is an effective vehicle for petit bourgeois infaltilism. Rowe's wife, the subject of his mercy-killing, is a shadowy figure who has already met her end at the beginning of the book. Nevertheless she provides a context for his soul-searching, a locus for his conscience:

> Once ... she had broken down, said she wanted to die ... that was hysteria ... later it was her endurance and her patience which he had found most unbearable ... He was trying to escape his own pain, not hers ... convention held them at the moment of death ... (p 89).

The key role of woman in the book however appears to be developed through the character of Anna Hilfe – making her German, yet morally pure to the point of heroism, Greene challenges prevailing popular mores. Anna is a woman whom tragedy has left 'brooding on some deeper, more unhappy level. Her brother had the ideas, but she felt them', whilst in her brother, the experience had given him 'an amusing nihilistic abandon'. She is depicted as feeling rather than thinking and, like a mother watching over recalcitrant children, she is beyond partisanship whilst simultaneously dispensing forgiveness: 'You think you are so bad ... but it was only because you couldn't bear the pain. But they can bear pain – endlessly.' Her ultimate role, not only as nurturer of the flame of goodness, of purity, but a person to be protected from ultimate truth – ('he was pledging both of them to a lifetime of lies, but only he knew that' (p 221)) whilst, paradoxically, remaining a source of 'grounded' wisdom, is a return to fundamental gender stereotypes: the *Angel in the House*[20] strikes again. In an early canvas of the theme that was to become prevalent in Greene's work – and more emphatic with the entrenchment of his Catholicism, the book ends with an attempt to balance the ambiguity and paradox of life with a tentative note of hope and stability, an acceptance of human frailty and plea for atonement: 'If one loved one feared' (p 220); 'It seemed to him that after all one could exaggerate the value of happiness' (p 221). This near open-textured ending approaches the moral debate at the heart of the book – the fear that there are no 'ultimate' truths or values – yet it permits Rowe the illusion of mastery even over paradox, and of a tender, protected heroine, who 'wanted him innocent and happy ... He had got to give her what she wanted' (p 221). Having met the confrontation with self produced by chaos, the retreat from history, ideology, metaphysics, the character fails to

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20 *The Angel in the House* is a series of poems by Coventry Patmore. The *Oxford Companion to English Literature* (Drabble (ed) (1985)) describes the series as (p 28):

> ... a mixture of high-flown sentiment and banal details about middle-class life ... Gosse referred to Patmore as 'this laureate of the tea-table, with his humdrum stories of girls that smell of bread and butter ... Woolf ... spoke of the need for women writers to 'kill the Angel in the House'.

meet the concomitant challenge: to be autonomous, to be authentic, in relations with others as well as the self.[21]

There is contiguity between this fictional account and the odd domestic harmony of Mr and Mrs William Joyce. Joyce's landlords, West tells us ((1964), p 66):

> ... liked his wife and thought he treated her tyrannously, overworking her and giving her no thanks ... He was tiresomely exigent about his meals; and not only had she to cook them, but she had to wash up afterwards and then run off to help at the league office in the daytime, and in the evenings at meetings. But the doctor and his wife had to admit that she adored him and that he evidently made her very happy ...

This image of attenuated identity in Mrs Joyce obtains to the very end when, still sharing a 'passionate' fascism with her husband (West (1964), p 117):

> They took great delight in each other's company, and on the morning of his hanging she retreated into a frenzy of grief which for long did not abate. It was necessary afterwards to send her back to Germany, for she had automatically become a German subject when her husband became a naturalized German ...

Elizabeth Bowen is more conscious of these issues, and attempts to posit factors which destabilise Greene's cosy retreat. The female protagonist is not 'rooted' but transient, restless, active, questioning. Lassner explains ((1990), p 124):

> ... this shift in the formation of female character questions traditional connections between women's prerogatives and social stability ... Although the war setting directs our attention to the tragedy of dispossession and loss, for Stella, these are gains ... she questions the language of absolutes on which the social and literary traditions which shape her are based. In turn, she is the means by which the male characters test the meaning of such traditional constructs as home, identity and moral responsibility.

Moreover, howsoever credible and virtuous the motivation of the traitor, or base and hollow the motivation of the patriot, both suffer from an inability to link, and therefore resist, the identity between hollow public and hollow private ideologies. The metaphysics questioned by Greene for harbouring *misleading* foundations, for Bowen bear *false* foundations. And presciently (as will be seen in the conclusion to this book) Bowen divines the odd cultural slippage between failed metaphysics and eternal metafeminine, demonstrating, as Lassner explicates, that:

> ... in a world where efforts to interpret reality collapse into hallucinatory chases without resolution, the mythic image of woman as possessor of secret knowledge re-emerges ... because she is unknowable, this woman seems to embody the secret all their spying is after: the power to affirm their plots in her inaccessible story, even if *she* has not found the key ... (Lassner (1990), p 133).

Bowen actively resists this imaginary feminine subject. Whilst the physical and ideological disruption of war provides opportunities to review values external to the self,

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21 Again, this was a symptom of the times. Annan ((1991), p 262):

> Authenticity is a shady customer. For a state of affairs to be 'authentic' it must correspond to what life ought to be like. To the left the Spanish Republic ought to have won and the Soviet Union ought to have declared war on Hitler to preserve Poland's independence in 1939. When reality did not match the picture book illustration of the world you withheld your approval ...

this does not, *must* not result in a newly 'centred', ethically pure 'inner' self, but rather a realistic balance between virtue and pragmatism:

> Through ... vacillations between personal loyalty and expediency, Bowen questions traditional assumptions about women being the key to moral stability ... (Lassner (1990), p 133).

– woman must not be made to hold the key.

'DOMESTIC FASCISM', IDEOLOGY AND THE NEEDY INDIVIDUAL

Why, in the teeth of a war fought against an identifiably destructive force, a war which has been identified in history, by the 'allies', not entirely without reason, as in some sense 'just', do these two novels concentrate upon the relativity of the respective moral positions and of the cause? Is it simply, or even partly, because both writers are themselves the products of privileged backgrounds, embarking upon a 'dilettante' critique of the status quo?[22] Were the affinities of such individuals romantically aligned with the 'radicals' of the 1930s?[23]

Both Bowen and Greene identify 'domestic fascism' as a root cause of individual alienation, of social and/or political disaffection. In this they reflect many of the observations produced by Rebecca West in her studies of treason cases – like Hannah Arendt's analysis of the Eichmann trial – there is a 'banality' motivating the apparently evil or 'negative' act, a muddled ideology, a multiplicity of motivating factors. In addition, Bowen, Greene, West and Arendt indicate the link between the search for meaning through new ideology and the emotional vulnerability, the neediness of the searcher – hence there is a clear need to explicate the nature of moral agency in *both* philosophical and psychological terms and the possible relatedness of these two hitherto discrete epistemologies. On an individual and on a cultural plane there is a loss of 'meaning' – of viable affinity to the existing order – which can only be assuaged by the promise of radical change: this explains to some extent the motivation not only of the freedom fighter, but of the sociopath, the literally or symbolically disenfranchised, as well as the unbalanced. In his analysis of growing up in Germany in the 1930s and 1940s Dieter Wellershof describes his realisation, years after his schooldays, that in insisting on a dogged analysis of the Roman Empire, repeatedly asking 'Who was Caligula?', his teacher:

> ... had always been speaking of Hitler ... a megalomaniac, a deluded paranoid ... Yet we were certainly the biggest idiots – from a foolishly trusting need for community and for a meaning to life that transcended everyday existence and assigned everyone a place in the

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22 Annan ((1991), p 325):

> Greene's pretty little trope about disloyalty rests on the premise that there is not a penny to choose between the culture of totalitarianism and the culture of western democracy ... to pretend that these differences do not exist is dishonourable ...

23 Orwell identified 'two important sub-sections of the middle class. One was the military and imperialist middle-class, generally nicknamed the Blimps, and the other the left-wing intelligentsia. These two seemingly hostile types ... are mentally linked together ...' (quoted in Sinfield (1989), p 116).

> greater totality. What other possibilities were there for self-definition? *Petit bourgeois* families, schools, offices, factories – was this life, was this one's identity? This was no model, no plan, all this was far too limited. The language of drums and banners carried us away from the tedium – into a bloody transcendence. Meaning is the greatest opiate, millions have died from it ... (Wellershof (1984), p 341).

Wellershof's comment that, by contrast, 'the capacities of the victorious powers to provide meaning were not exhausted' is cited by Morrison ((1995), p 315) as evidence of a far reaching ideological contrast between Germany and the Allies:

> Germany had no intellectual capacity to provide meaning, to provide a jurisprudential imagination to fill the void of Nazism.

Yet West's analysis of the mindset of William Joyce, Bowen and Greene's absorption and modelling of the miasma bringing the mindset to being suggests that the lack was pan-European: historical accident made Germany's population more vulnerable *en masse* to the void.[24] Wayne Morrison's text 'On the homelessness of modern man' ((1995), p 298) indicates a clearly apposite cradle of identity in this regard. The well worn questions as to whether Hitler would ever have formulated his extreme views had he experienced better parenting/had reparations not crippled the Weimar republic/had he been accepted into art school, may be equally applicable to the less notorious 'deviant', whether traitor or petty criminal. Conversely, the muddled or declining framework, the moral dereliction, may originate not with the individual but with the 'prevailing' ideology – arguably then, the only 'healthy' response is rebellion or anarchy.

From a feminist perspective, the 'domestic fascism' which fosters exploitation of individuals 'disadvantaged' by the status quo and equally damaging lionisation of those assigned privilege, originates with repressive societal values of which the domestic – as so eloquently indicated by Woolf – is simply a microcosm. Large scale tyranny is acted out, supported and normalised through the infrastructure of petty tyranny, however sublimated, in the home. Just as women may be instrumental in promoting the values of war – distributing white feathers to the faint hearted however far they may be from making or comprehending the policy of war – so too they may 'collude' in the perpetuation of domestic values which maintain their tenuous, yet relatively 'stable' position as lackeys. Certainly Greene and Bowen indicate as much both in the susceptibility of minor characters to propaganda and in their anxiety to entrench personal identity through such 'community' values; through the perpetuation of 'tradition' and patriarchy by apparently 'powerful' matriarchs. Crucial to any understanding of the feminist interpretation however, would be some indicator that, however normative, however internalised such domestic values might be, however 'successful' or 'comfortable', even 'masterful' the feminine existence within the sphere, it is not an existence arrived at through choice but through adaptation – an adaptation, however

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24 Some have attributed the relative 'textual poverty' and concentration upon the personal in wartime novels to a similar sense of emptiness:

> Unlike the First World War, there was no gap of experience to be bridged, no tremendous hidden knowledge to be communicated ... Elizabeth Bowen's *The Heat of the Day* ... an elaborate network of character studies ... the seedy urban locations and pessimistic readings of human nature of Greene's thirties fiction easily adapted to wartime and post-war conditions in *The Ministry of Fear* and ... *The Heart of the Matter* ... (Laing (1983), p 239).

There is real intellectual dispute then, about the role of the personal in the production of the void.

virulent, as with Mrs Joyce – resulting from a more profound repression of independent critical faculties than that accommodated by even the most 'humble' man in his relation to the dominant order. If William Joyce is less the free-willed agent than the law is forced to believe, how is woman positioned? It seems that the male – whether 'lionised', ignored or reviled within the family and immediate community, is more likely to occupy 'actively' a lacuna between conventional expectations that he 'master' the world beyond the domestic, and his capability to do so – a clearly gender-cultural account of transgressive drives. Writing in the 1940s, neither author is sufficiently distanced from the prevailing order to signal such an issue, nor might they have wished to had it been made evident to them. Both are already, in one sense, critiquing the status quo, the received wisdom of the time, by depicting, on the one hand, a protagonist who recognises the moral chaos *shared* by both sides (though not necessarily best analysed through the mercy-killer – treachery spectrum) and on the other, a protagonist whose 'treachery' derives from a 'pure' moral position fuelled by the cold amorality of his domestic origins; the domestic as microcosm of the degenerate state. Though both writers identify the political significance of impoverished ethics in the domestic life, neither follows the connection entirely through to Woolf's model, that nationalism – as jingoism, the expansive public ideology is intimately tied to jingoism-at-home. Nevertheless, Bowen *does* identify, acutely, a slippage of morality into convention, and of morality as personification.

Rebecca West shows a contrasting ambivalence towards her subject: on the one hand she can clearly identify the *lack* of evil intent, the muddle, the inadequacy or the various perpetrators of treachery, and in this mode she provides a careful exposition of their *lack* of full agency, of a fully coherent and rational intentionality in their actions. On the other hand, as an ultimate rhetorical position and perhaps in recognition of community pragmatics, she returns to the voice of institutional authority – to the voice of the judge, the moral inquisitor, who despite this circumstantial evidence, must rule in favour of the State. Glanville Williams, in his critique of the Joyce decision, notes how ambivalence regarding the formal justice of the decision is both expressed and resolved by legal formalism:

> As the volume of criticism of *Joyce's* case shows, the maxim *nulla poena sine lege* is now deeply ingrained in our national consciousness. Of course, the judges did not consider they were violating this maxim: they believed themselves to be merely applying settled principles to new facts … (Williams, GL (1948), p 55).

THE NATURAL LAW REVIVAL

If the existential dilemma revealed by such scenarios is troubling for the individual – the alienation of the individual, his search for meaning, for authenticity, his lack of real agency in the face of the contingent – then the paradox is as great for the community. The need to 'fix' the subject with 'responsibility' for his actions is more an exercise in ethics *compromised* by pragmatics.

This chapter began with a quotation from Rebecca West. The quotation in its entirety reads slightly differently in the two editions of her book. In *The Meaning of Treason*, published in 1949 (the same year as Bowen's novel), the quotation is as follows:

> Such alternatives of hope and despair, such visions of hope and despair relating to eventualities not of this earth, are known to all of us, confined as in a cell in the flesh. On the floor of the courts where William Joyce was tried there was tested an issue of how far the letter is divorced from the spirit; it was debated whether a man can live all his life among a tribe and eat their salt and in the hour of their danger sharpen the sword that their enemies intend for their breast, and then go free because of something written in an old book which said that this man was not truly of that tribe. But in the upper air above these courts it was argued whether the God with whom man can have a perfect relationship is the dream of disappointed sons imagining a Father who shall be better than all fathers, or is more real than reality. This other trial was not concluded, not being confined to time or space. For it was expansive as the life of clouds, which overpass the horizons binding any human habitation; it began with some remote birth and will not now end till the last death. It is this uncertainty which gives life its sickening and exquisite tension. Under that tension the fragile body of William Joyce quivered as he sat in his several docks … (pp 220–21).

In *The New Meaning of Treason* (1964), this passage reads:

> He said that he had had a fair trial; but he had had two trials. On the floor of the courts where he was put in the dock there was tested an issue of how far the letter is divorced from the spirit, an issue which must have come up again and again since the birth of law. Centuries ago, or in the part of the world least visited by civilisation, it might be debated whether a man can live all his life among a tribe and eat its salt and in the hour of its danger sharpen the spears that its enemies intend for their attack on it, and go free because he has not undergone the right ceremonies which would have made him a member of that tribe. But in the upper air above the courts it was argued whether the God with whom man can have a perfect relationship is the dream of disappointed sons imagining a perfect Father who shall be better than all fathers, or is more real than reality. This other trial was not concluded, for it began with some remote birth and will not now end till the last death. It is this uncertainty which gives life its sickening and exquisite tension, and under that tension the fragility of William Joyce was as impressive as his strength … (pp 121–22).

Now although the modifications to these two passages are slight, and indeed it may be argued that it would be wrong to attach too much significance to them since texts routinely undergo revision, nevertheless it may be that the changes have a significance in terms of cultural change over chronological time. The Biblical analogy integral to the court adjudication of the 'spirit' and the 'letter' of the law in the earlier version – of a man betraying the tribe who has shared its salt with him – is recast as *anthropological curiosity* in the later version. In doing so, West has attempted to recast and so capture more effectively the atavistic as well as ethically mercurial aspect of the letter-spirit distinction. The later version attires Joyce with a greater degree of authorship – West's earlier 'schizophrenia' towards the 'victim' Joyce and the 'evil' Joyce has become more harmoniously aligned in an accused whom she perceives as bearing a greater degree of integration – a balance between fragility and strength. Yet she does not thereby indicate greater autonomy. Her prescient representation of the psychoanalytic/psychological 'truth' in another, equally – if not more – powerful courtroom in the upper air, adjudicating the claims of disappointed sons dreaming of a perfect father-God has become culturally historicized and reflects the skewing of values in the home where there is a moral 'effect' but little room for moral growth. Considering the decades spanned by these revisions, their subtlety would seem to indicate potentially seismic shifts in the standing of history as unproblematic, of a morality universally shared and understood, of

law as source of dispassionately authoritative ethics. So broadening the 'anthropological' context, of this link between ideology and need, there is a concomitant sharpening of the critique of justice opened by divergence between the letter and the spirit of the law. Locating it as a question residing in 'the upper air' and beginning 'with the first birth' and remaining unresolved until the 'last death' compounds the view that such needs and motivations are both fundamental and timeless. Though for Bowen's characters 'time sat at their table', crystallising the immediate, political context of existence, war acted as a 'thinning of the membrane between the this and the that'. If only notionally, the courtroom of the upper air, beyond space and time, its frail subject facing the vertiginous threat of an indifferent universe, challenges and ruptures the membrane of the temporal courtroom.[25]

These anxieties and journeys, from Biblical to anthropological accounts of transgression, from a divine fusion of spirit and letter in the law, to mortal adherence to spiritually impoverished, dead-letter law, are discoverable in jurisprudence. The post-war period is identified with a revival of developments in natural law theory, characterised in part as a response to the Nazi atrocities. Ian McLeod notes:

> Although Hume's argument about the impossibility of deriving an *ought* from an *is*[26] is for many jurists ... a knock-down argument against all forms of natural law thinking, in reality 'it merely deprives natural lawyers of that most revered of philosophic weapons, the deductive syllogism' ... The possibility remains therefore of seeking alternative forms of rational support for the idea of natural law, and as the scale of the Nazi atrocities became known, the desire to do so revived ... two major and quite distinct theoretical expositions emerged ... (McLeod (1999), p 84, quoting Harris).

These distinct expositions are developed in the writings of Lon Fuller and John Finnis, developed some decades after the war. Of the two, Fuller's account departs less radically from the approach of positivism – his form of natural law theory is 'procedural' rather than 'substantive'. For Finnis, the moral question is more central – natural law is *evaluative* rather than *constitutive* of positive law: a conciliatory model which nevertheless makes natural law the 'arbiter' of positive law, thereby giving natural law a covert ascendancy.

The 'historical gloss', from the atrocities of war to the revival of natural law theories culminating with Fuller and Finnis certainly seems plausible and is supported by references *to* law under Nazi rule. A point not extensively explored by the 'gloss' is the fact that the 'return' to natural law theory has been dominated by Catholic philosophical scholars, for whom the natural law tradition was a direct bequest to their spiritual as well as intellectual fabric.

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25 For a psychoanalytic reading of this clear nexus between law and the Father, see Salecl (1993). Contrast Irigaray, who explores the relocation of such conflict in terms of the disregarded or effaced feminine.

26 Note that normative jurisprudence is expressed as the search for an ought from an is – in other words an obligation (founded in morality) to do something from an 'is' – an existing set of facts. This link to morality is regarded as the province of natural law. Analytical jurisprudence, the systematic identification of legal systems, independent of the question of moral obligation, is the province of positive law.

Greene too was a Catholic, yet his text is riven with doubt about the *reliability* of 'essentialist' moral constructs – indeed he portrays them as the rather indiscriminate source of *either* moral integrity or corruption.[27] Bourgeois culture, Christianity itself, has provided an inadequate diet: for the infant, fictional 'myths' of absolute goodness, innocence, courage; for the adult, mere conventions based upon these myths. Greene's apprehension itself may be doctrinal – throughout his work an essential theme is that of man as embodiment of saintliness and human frailty, the tortured whisky-priest, sinful martyr.[28] Catholicism itself then recognises the paradox of virtue, yet as the mainspring of classical natural Law theory, is puritan in its approach.[29] D'Entreves, writing of the movement from classical natural law to legal positivism, explains of his perception of a still dominant *positive law* in the 1950s:

> ... there is no doubt that natural law was the *belle dame sans merci* who inspired the crusading spirit of old-time jurisprudence. That spirit has gone. It has given way to a realistic approach which is in keeping with the age of prosaic undertakings. The study of the ideal law is no longer conceived as being of any relevance to the lawyer ... the problem of the ideal law is neither denied nor declared insoluble. It is simply put within brackets as irrelevant to the task of the jurist ... (d'Entreves (1951), p 96).

D'Entreves traces not only the developing allure of scientific positivism, but also indicates here a reason for classical natural law's concomitant fall – it had a 'merciless' quality, ironic given that this was the characteristic, by association with politics, later attributed to positivism. Certainly well before the end of the Second World War one can find traces of a 'modified' natural law, less fundamentalist in theological and ideological terms. Jacques Maritain, writing in 1944, asserts the re-emergence of natural law as a necessary corrective to the inadequacies of Rousseau's vision of Man:

> Rousseau's ... philosophy built no solid foundation for the rights of the human person ... because it led men to conceive them as rights in themselves divine, hence infinite ... denying every limitation imposed upon the claims of ego (Maritain (1944), p 38).

Insisting therefore that men:

> Are called upon to be the sons and heirs of God in the Kingdom of God ... awakening ... to the requirements of natural law (p 39).

Maritain's assertion regarding the *content* of natural law is basic:

> ... *natural law* deals with the rights and duties which follow from the first principle: 'do good and avoid evil', in a *necessary* manner, and *from the simple fact that man is man,* nothing else being taken into account ... (p 39),

27 Greene commented 'If writers don't become loyal to a Church or a country, they are too apt to become loyal to some invented ideology of their own' (quoted in Adamson (1990), p 76). This was precisely Bowen's point of departure – not to be seduced by the alternative soma of a falsely comforting ideology.

28 Sinfield argues:

> The myth of universal savagery is the final, desperate throw of a humiliated and exhausted European humanism ... It works like this: when it was just the natives who were brutal, the British were enlightened and necessary rulers. But if the British are (have been) brutal, that's human nature ... In Greene the savage-in-everyone idea ties in conveniently with the Christian notion of 'original sin' ... (Sinfield (1989), p 141).

29 With time, it seems Greene's writing became more distanced from any belief in an 'objective' moral essence residing in Catholicism – see Adamson ((1990), p 89).

and the *ambit* of natural law is modest:

> Human rights are rooted in the vocation of the person (a spiritual and free agent) to the order of absolute values ... (p 45),

whereas civic rights 'spring directly from positive law' (p 46) – the approach reflects an accommodation of persons *pace* private individual and public citizen, of natural and positive laws, of civic and divine domains. Yet the 'free agent' is called 'to the order of absolute values' – an abstract creature of abstract principles. Though attempting to bring the disparate lessons of recent history into a new concerted logic (culminating in a revivified Thomism and solidly natural law assertion that an unjust law is no law) the works of Maritain encapsulate the less than coherent shift, for individual agents, between divine and secular notions of morality.

Maritain is one of the scholars associated with the 'post-war revival' of natural law theory. In fact, written reappraisal of the value of natural law can be traced back to the 1930s, spurred on by the battle of totalitarian ideologies played out first on 'domestic' as opposed to 'international' ground. In The Herbert Spencer Lecture delivered at Oxford in 1934, Inge ((1934), p 34) observes:

> The question arises, Why should the State be selected for apotheosis? We all belong to a great many social 'organisms' or associations, some of which are smaller than the State, others larger. Each of these has just but limited claims upon us. I owe loyalty or consideration to my family, my Church, my profession, my country, the comity of civilised nations, humanity, and all living creatures ... total and almost unresisted destruction of liberty in one great European nation after another ... In Russia millions have been judicially murdered ... Even in civilised Germany a racial persecution recalling the Dark Ages has been instituted ... though the appeal to Natural Law leaves very many questions unsolved, and gives room for widely different ideas of justice, the advantage of admitting that things are right or wrong absolutely, and are not merely made right or wrong by parliament or public opinion, is incalculable.

Alfred Cobban, writing *The Crisis of Civilisation* in 1941 from the perspective of historian rather than Catholic jurisprude, is even less tied to the forging of a plausible teleology from the harmonised remnants of a narrow theoretical base. Cobban emphasises the fundamental importance of theory to the moral life:

> This contempt for mere theory has been particularly marked in Great Britain. To proclaim a complete indifference to theoretical considerations has been a certain way of securing the sympathy of the business men, civil servants, lawyers and practical politicians, the men, in fact, who led the country to the point it reached in 1939 ... (Cobban (1941), p 18),

later adding:

> ... if a man feels himself a stranger, or even an enemy to the community he lives in, what use is it to appeal to his sense of duty – by definition he has none? (p 122).

Both quotations reflect faithfully the networked model of theory, morality and identity indicated by Rebecca West in *Joyce v DPP* (1946) and explored in the texts of Greene and Bowen. Cobban's approach to theory is via a social and political history which inevitably reflects upon institutional interaction with the individual psyche. Anticipating the return to natural law values, Cobban is less theoretically partisan than the Catholic jurisprudes writing at the time, and thus anticipates concerns in early form and the delicate balance between credulity and scepticism only achieved latterly in jurisprudential debate:

> With the revival of the idea of Natural Law our political thinking can again be based on a system of rights. Only, this is not a mere resuscitation of the eighteenth century conception of abstract natural rights. We have to take our stand with Burke on this, and regard rights, to borrow his phrase, as a goal and not a possession. Their basis is not abstract reason but human nature, and thus they escape the main defects of eighteenth-century theory ... Positive laws and institutions, we must insist, are not good or bad in themselves, but only in accordance with their rights for individuals. This principle has important implications. It means that political and economic problems are not problems concerning ends, for these are laid down by Natural Law: they are simply questions of social technique ... But instead of putting forward as the test of social utility the Benthamite calculation of pleasures and pains, we have in its place the ethical criterion provided by the rights of the individual ... (p 127).

Now although Cobban's hearty use of 'natural law' as an unproblematic category is perhaps naïve and the vocabulary of 'rights' to which he refers has itself proved a troublesome inheritance,[30] in general the text reflects a more tenable link between abstract ethic and private citizen, a representative of 'human nature' not the 'agent' of 'absolute values' proclaimed by Maritain. This steps, in rudimentary form, towards taking note of the presence of 'individual psyche' in the equation – the individual in *psychological* as well as *ethical* dynamic with society. In addition, the individual is placed in a 'group' dynamic. Beginning with a quotation from Niebuhr, that:

> Our contemporary culture ... fails to realise the power, extent and persistence of group egoism in human relations ... the relations between groups must therefore always be predominantly political rather than ethical ... (p 128)

Cobban concludes:

> The essential point to which we must return is that no political act or institution can be a good in itself, whatever its origin or ends. There is a difficult doctrine here which Karl Barth has expounded. 'The more successfully the good and the right assume concrete form', he says, 'the more they become evil and wrong – *summum jus, summa injuria* ... this theocratic dream comes abruptly to an end when we discover that it is the Devil who approaches Jesus and offers Him all the Kingdoms of this world. It ends also with Dostoevsky's picture of the Grand Inquisitor. Men have no right to possess objective right against other men' ... (p 130).

Placed together, these texts from the decades of the 1930s and 1940s demonstrate the struggle, part conceptual, part linguistic, to express notions of irreproachable, absolute values, the values of natural law, to act as polestar, guiding the everyday adjustments of society in its response to the contingent life. Yet there is an insoluble core reflected in the texts so juxtaposed. All, in their own way, try to preserve a place for absolute values – fearing that the alternative is a descent into relativism – yet this must be achieved by asserting a tenuous boundary between the operation of absolute values and the necessity

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30 Sinfield ((1989), p 15):

> Marshall ... saw an opposition, through the previous two centuries, between class and citizenship rights: class tends towards hierarchy, he said, whereas citizenship tends towards equalization. The latter is composed of civil, political and social rights. Civil rights ... developed in the eighteenth century; during the 19th and early 20th century political rights were achieved; and now, in the postwar settlement, social rights were being added to citizenship ... [other] Historians dispute the idea that a historic shift towards a new kind of civilization occurred in 1945 ... the effect on gender politics was conservative ...

of adaptive values. There is a tension between absolute value as ultimate arbiter of the good, and absolute notions of the good, good assuming 'concrete form', becoming 'evil and wrong'. This tension is still in evidence in the reluctance of jurisprudes, even natural law jurisprudes, to assert anything more than extremely abstract and 'general' conceptions of good and in their attempt to achieve a balance between form and substance – the precise territory of dispute between natural and positive law.

Cobban is suggesting a similarly tenuous distinction between concrete notions of particular political 'goods' and the aspiration towards stable notions of moral good. In developing this theme, he develops examples of prophetic significance to our texts and case:

> What (political philosophers) usually mean is duty to the state, and duty to the state must not be questioned. Suppose ... I am a young British Communist. I was born to poverty; by constant striving I obtained some education, only to find that, since I was neither brilliant nor servile enough to be useful to the governing classes ... If ... for the state we read the nation, what is the nation if not a society composed of those who believe they are of the same nationality and for that reason have a common duty? If I do not think of myself as an Englishman, have I any national duty to England? ... If we fall back on a duty to society, then one has to ask what is this society ... (pp 120–21).

The quotation is mirrored in the unresolved trial in the 'upper air' of *Joyce v DPP* (1946), in the doubts of an 'ahistorical' Rowe/Digby, in Bowen's 'principled' traitor, for whom there is:

> ... no source of anything in anything. I could have loved a country, but to love you must have – you have been my country.

For Greene, however, not only does the contingent political world create doubtful antecedents and claims,[31] the metaphysical world does so too. He is not suggesting – as some postmodern theory suggests – that there are *no* values but, more subtly, that they can become inextricably harnessed to doubtful politics in public and private terms – 'courage squashes a Cathedral', 'pity kills', 'we are trapped and betrayed by our virtues' – with the implication that since such 'misapplication' of values to concrete causes can only be understood in retrospect, virtues, deontological notions of the good, are ungovernable sources of normativity.[32]

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31 McEwan comments (McEwan (1988), pp 13–14):

> During the 1930's when so many English writers were, or believed themselves to be, Communists, his Catholicism restrained him from joining the extreme left but there is an interest in the mystique of the Communist Party, and an insistence on the 'corruption' of capitalism ... It can be argued that Greene had dreamed of a Communism that does not and could not exist, and that if he were frank he would confess to the liberalism which marks all his work ... Greene is opposed to Communism as it exists, but respects Communists as far as he can see them as idealists, more aware of social evil than are the complacent majority of people.

32 Of Greene's oevre, particularly *The Ministry of Fear*, Zabel ((1973), p 32) comments:

> Every age has its aesthetic of crime and terror, its attempt to give form to its special psychic or neurotic climate. No age has imposed greater handicaps on the effort than ours. Crime has gone beyond Addison's 'chink in the chain armour of civilized communities'. It has become the symptom of a radical lesion in the stamina of humanity. The hot violence of the Elizabethans is as different from the cold brutality of Hitlerian or Communist Europe, the heroic sin in Aeschylus or Webster from the squalid and endemic degeneracy in Communist Europe ...

It is intriguing to consider the extent to which such cultural and moral fabulations in the Zeitgeist of each age interact with philosophical developments.

Finnis responds most closely to this anxiety in the role of practical reasonableness in creating moral obligations. The fundamental human good – freedom and reason – provides an irreducible baseline for the induction of practical reason creating a neo-normative model of obligation. Instead of the normative 'fact-value', 'is-ought' relation, Finnis derives an 'ought' from an 'ought'. As McLeod notes, this opens him to the objection that we are thereby thrown back entirely on the world of (unverifiable) value: at heart this perhaps reflects a Catholic faith in essences.[33]

It is a *theoretical* distillation from Greene's anxiety concerning the reliability of normative discourse. Moral values are 'there'; relating them reliably to our (contingent and often paradoxical) 'here' is another story: Greene anticipates the anoxic heart of jurisprudence to which Finnis ministers as neo-Catholic field surgeon.

In describing Greene's politico-religious oeuvre, Noel Annan ((1991), p 213) identifies him as *seeming* to be:

> The most unorthodox of Catholics, teetering on the verge of infidelity. But by the standards of his generation he was the soul of orthodoxy. The virtue he put first was compassion ... it flows towards the edge of things: the honest thief, the tender murderer ... Greene was orthodox in playing the political game of *tu quoque*: what difference is there between American aggression in Vietnam or central America and Soviet intervention in Eastern Europe or Afghanistan ...?

Annan notes that Greene wrote of Evelyn Waugh's Catholicism: 'He is a romantic in the sense of having a dream which failed him.' Yet Greene himself, however adroit in fielding the paradoxes of *to quoque* in discrete maxims, in the *non-sequiturs* produced by collisions in orthodox rationality – 'pity kills' – does not entirely pursue the implications through the ethical model that is the text. Fifth columnists may be parochial, misled, but they are also *sinister* or *odd*; Rowe/Digby may have staggered into a physical *and* metaphysical quagmire, as mercy-killer, as ideological 'dupe', but he is essentially the Catholic vision of man, admixture of human frailty, sin and compassion. His German counterpart on the other hand – the ideological enemy – is fatally flawed and heartless: Greene too is at heart a romantic, he has lost the game of *tu quoque*.[34] Bowen on the other hand – perhaps with the acquired wisdom of post-war time – *personifies* the challenge to deontology, through her 'virtuous' traitor and 'treacherous' patriot. In doing so, Bowen takes Greene's

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33 Simmonds ((1986), p 71): added that the 'incommensurable' goods identified by Finnis may be rendered:

> ... 'commensurable' by converting them into subordinate, instrumental goods. If people came to experience their lives in such a way that friendship, learning, beauty and the rest were evaluated simply as sources of enjoyment, these values would indeed have become commensurable (by ceasing to be independent values). One can argue that it is precisely because our lives have come to be experienced in this way that utilitarianism has been such a widely influential theory ...

– the instrumentality of 'goods' in our everyday lives may become separated from their ethical base – literally 'consumed' by consumerism.

34 It is interesting to consider the chronology of Greene's moral journey. Adamson (1990, pp 89–90) notes:

> At the end of the thirties Greene was pushed by the gathering forces of war to an emotional pitch of Catholicism ... nearly a decade later, after the methodical killing of six million human beings, there is no mention of the barbarism of World War Two. There are only individual innocent deaths ... and [the character] Scobie ... trying desperately to give no more pain in a world God has abandoned. Looking back on the war Storm Jameson wrote, with a certain irony, that 'a vast no-man's land separates truth from the rhetoric composed in anguish and good faith by people used to handling words' ...

argument a step further. Not only are we *trapped* and *betrayed* by our virtues – a Platonist as well as Catholic vision of the great distance to be travelled by (a rather impotent) human frailty in the pursuit of the good. The 'virtuous traitor' – the true checkmate in *tu quoque* – is an *ethically irreproachable agent* of 'treacherous' virtues. Howsoever a misguided traitor in public eyes he is the freedom fighter in his own – inevitable spawn of a society where convention supersedes the moral life, of that anoxic heart ministered unto by natural lawyers.

Law must function at two levels – and this is perhaps another way of characterising the positive/natural law divide. At a pragmatic level, it cannot over-individualise principle, it must serve its purpose in dispensing justice as formal justice perceived by community values and not be drawn into the 'upper air' by pure sentiment. On a different level, however, the question identified by West, of the human frailties at issue in the upper air of the courtroom, and by Greene and Bowen, of the complex and sometimes misleading path to be negotiated between individual and collective identity and notions of the good, does pose a moral question for legal process. How far can a society *afford* to take account of the vagaries of individual frailty, a frailty which is not 'incapacity' as we understand it but the action of ideology on an alienated psyche? Even if such a question is not justiciable in practical terms, it is still a potentially valid 'model' – rather different from the free-willing, rational agent of classical doctrine – in raising a moral doubt for legal theory. Indeed, as this chapter indicates, the concern is evolving in the texts of fiction and jurisprudence. The 'reasonable man' raises a presumption of rationality which in many, perhaps most, cases is satisfied more by accident than by design. 'Values' are not simply 'out there' but present a world of paradox, and are absorbed and *metabolised* by the frail human psyche.[35]

With regard to the role of gender in the fictional critique of moral discourse, Bowen and Greene produce an interesting contrast. Both identify a spiritually and morally impoverished private and domestic life which is in turn a seed-bed for unsustainable public values. For Virginia Woolf, and for feminists today, this is a political and ethical issue, not only linked to the relegation and impoverishment of feminine identity but also to the conventional *conception* of the public-private divide. As this study indicates, the issue is important from a broadly *humanist* perspective – for it traps and betrays women and men too. Greene retreats from the metaphysical enquiry initiated in his text – his

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35 Indeed, the 'psychoanalytic' perspective and its relevance to the feminine, is particularly pertinent to West's reading of *Joyce v DPP* (1946) and to the supporting texts of Greene and Bowen. The trial in the upper air, 'God … the dream of disappointed sons imagining a Father who shall be better than all fathers' is explored in the work of Pierre Legendre. Pottage, exploring Legendre ((1994), p 28 – summary of Pottage by Goodrich, Douzinas and Hachamovitch):

> … examines the psychoanalytic formulation of law as 'the law of the Father', and reconsiders the sense in which the authority of law, of reason, of knowledge are supported by the mythological authority of the symbolic father. Pottage argues that while the paternal metaphor may represent one particular unconscious structure of Occidental culture, it is not obvious that this representation does not itself repress other possible representations of power which have been dislodged by a quite conscious valorization of a masculine politic, a masculine desire, and a masculine ethic. The French feminist philosophy of Luce Irigaray is, Pottage suggests, the perfect foil to the theoretical claim that a paternal order of misfortune is the unconscious foundation of Occidental subjectivity. For Irigaray, the quests for God, for law, for truth are the effects of a political order constructed to confirm a 'masculine imaginary body', and to suppress the figure of the Mother who is none the less present, to mark the place of a lost (emotional) origin, for which auto-affection is but a substitute.

protagonist turns, from the insoluble paradox, the consumption of morality by convention, to the arms of Anna Hilfe. As woman-child, a temple of fundamental goodness, the flame of virtue can be kept alive; but only by shielding her from the 'truths' so painfully carried by Rowe. Bowen depicts a similarly *morganatic* relegation of woman in the metaphysical world; her comment however is intriguingly more aware of this use of woman as embodiment, temple and final refuge:

> No source of anything in anything. I could have loved a country but to love you must have – you have been my country.

Is it Man, or philosophy as a discipline which retreats from the flames of paradox and uncertainty near the cave entrance, back to a deeper, darker elemental region? How does this use of woman as infantilised guardian of the sacred but insoluble relate to the development, not only of *material* arrangements but theory itself?

Finnis (quoted in Davies and Holdcroft (1996), pp 178–79) explains that ethics cannot be:

> ... deduced or inferred from metaphysics or anthropology. But a mistaken metaphysics or anthropology will block one's reflective understanding of the way in which one participates in the human goods (particularly the good of practical reasonableness itself).

In making 'practical reasonableness' the *locus* of this concern, Finnis directs our view of the pathway to ethics as a practical journey, and that this practical journey may be misdirected by a 'mistaken' metaphysics or anthropology. Presumably then, a more authentic metaphysics or anthropology may *facilitate* the journey to ethics. Finnis's theory, especially with his emphasis upon practical reason, attempts to place metaphysics, as a source of natural law, in a more balanced relation to our sources of value judgements; 'mistaken' metaphysics or anthropology are identifiable not simply through reason but experience. 'Practical reasonableness' may allow us, in its refined relation to such disciplines as metaphysics and anthropology, a more precise tool with which to identify the good. But it is not simply the piecemeal shopping list of goods which is at issue. Private and public, feminine and masculine spheres have shaped and been shaped by the metaphysical as well as physical and contingent notions of the good. And tracking 'mistaken' metaphysics and anthropology may mean a more profound shift in practical reason than is yet realised. Such questions are revisited in the next chapter.

CHAPTER 5

THE 1960s – THE EMPTY SHELL: JOHN FOWLES'S *THE FRENCH LIEUTENANT'S WOMAN* AND IRIS MURDOCH'S *BRUNO'S DREAM*

INTRODUCTION

The 1960s is remembered as a period which, more keenly than most, displayed the tensions between liberation and repression, between political idealism and political corruption. The battles of competing ideologies – exemplified by the Vietnam war – continued to rage overhead, the persuasive force of their claims matched by the minatory force of their warnings. Much of the philosophical and cultural debate of preceding decades was beginning to bear fruit in terms of the claims of the individual, yet anxiety concerning the effects of such freedom preoccupied the Establishment in a 'battle' between competing claims upon the meaning of progress and of progressive liberalism.[1] The 1960s were a time of extraordinary theoretical tension between philosophy and scientific empiricism; the decade saw the passage of the Abortion Act, and the legalisation of homosexuality between consenting adults. Yet with regard to the criminal law, Lady Wootton's conclusion[2] that our understanding of agency and responsibility might be flawed drew TB Hadden to retort:

> Terminological transformation may be made to have a very important practical consequence, namely the rejection of the concept of responsibility and the introduction of a system based entirely on treatment ... Lady Wootton, like Bentham before her, declares her belief that the ultimate aim of the courts should be to prevent further crime; punishment should not therefore be imposed upon criminals except in so far as it may help to achieve that aim ... (Hadden (1965), pp 118–19).

Wootton clearly attempted to undermine old certainties – certainties which the previous chapter revealed as mutable – such as the polar embodiment of 'good' and 'evil', the socially neutral vision of the citizen embodying 'free-will' – all classical conceptions of mankind owing as much to myth as fact and yet of central importance to law. Hadden, quoting Hart, saw himself as championing the freedom of the individual; that the notion of responsibility was reflected in the choice of the free-willing agent to transgress or not to transgress. Lady Wootton, on the other hand:

> ... claims that no valid distinction can be drawn between psychopathy and wickedness in terms of responsibility ... (Hadden (1965), p 127).

Certainly Lady Wootton's notion of approaching offenders as persons in need of 'treatment' at worst could have opened policy to the danger of new forms of abuse; yet her warning concerning the indistinct boundaries between 'psychopathy and wickedness'

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1 Sinfield ((1989), p 284) comments:

> The authority and consensual significance of 'art' and 'literature' collapsed together with other kinds of authority and consensus. Irreverent attitudes invaded such citadels as the Church of England and the BBC ... Robinson was headlined as declaring 'Our image of God must go'; Leach questioned whether there is something intrinsically virtuous and natural about law and order, argued that moral rules are conventional and cultural ...

2 In *Social Science and Social Pathology* (1959) and *Crime and the Criminal Law*, discussed by Hadden.

– between 'mental' and 'moral' sickness – continues to haunt us. Philosophy squared up to science, the putative agent of free-will hovering uncertainly between them.[3]

Both Hart's revival of positivism in *The Concept of Law* and transformation of natural law attempted, in their different ways, to mediate this uncertainty. For pragmatic reasons, both models of the law attempted to assert a core vision of human nature and the reasonable demands which could be made upon this vision. At the same time, both positivist and natural law approaches to this vision of human nature were minimalist, for more than ever before – as the Wootton/Hadden contrast makes clear – there was uncertainty about the true provenance of will and of the human heart. The uncertainty is the place where science meets philosophy, where the 'nurtured' self meets the 'natural' self, individual meets community. It remains the key ethical question for the 'existential' self.

In the 1960s, the politics of writing was anarchic, daring the writing of politics towards a new sense of consciousness. This chapter is concerned with two books of the period not particularly renowned as experimental or *avant-garde* for their time, yet clearly committed to philosophical projects: John Fowles's *The French Lieutenant's Woman* and Iris Murdoch's *Bruno's Dream*. Both can be read simply as 'stories' – the one a conscientious return to the Victorian romance/mystery genres, the other a domestic drama centred upon a dying man, which hovers between tragedy and farce. Both books, however, are conscious vehicles for the examination of deeper moral questions. Fowles's *The French Lieutenant's Woman* uses his journey to the values of 1867 to critique the past and its connections with 1967. Murdoch plays with the fabular potential of the novel form so that the petit- and petty-domestic engages with major questions concerning human agency and notions of the good – questions emanating from the 'cave' that is domestic life. Yet whilst Fowles examines the cultural climate – the web-like structures (and strictures) which impinge upon individual agency, Murdoch is one step removed. The 'particularities', the contexts and 'incidents' of individual lives are incidental to the capacity of the individual to respond as moral agent. Both books, in their different ways, deal with the linkage of intimate and universal, both deal with existential anxiety, yet their approaches are very different, revealing nuanced perspectives upon moral issues which in their turn may reflect upon the political and legal climate of the 1960s.

BRUNO'S DREAM

What lessons can we learn about the moral life, about notions of free-will and agency, when the fictional text appears to float free of any particular historical, social or political

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3 Sinfield traces the developments leading up to this stage (Sinfield (1989), p 140):

> Since the eighteenth century, the notion of innate human depravity, as received through some Christianities, has been persistently challenged by ideas that people are either innately good, or neither one nor the other and therefore improvable. In the eighteenth and nineteenth centuries, in the period of imperial enterprise, progress seemed easy to demonstrate, in science and technology, economic and political institutions, in the arts and humanitarian concerns ... The savage was that which European Man had left ... The debate was intensified in the 1950's by awareness of Nazi cruelty, Stalinist oppression, the atomic bomb and the general success of science. In 1955 Bertrand Russell said: 'There is no end to what science can do by way of destruction, and also no end to what it can do in the opposite way ...'

context? Notionally, it seems, as with the classical Greek or Shakespearian literary tradition, more timelessly 'universally' persistent than the text 'tied in' to contemporaneous issues. As with any debate concerning the ethical status of the universal and the particular, between practical and abstract reasoning, this text attempts to cross the divide, interrogating questions of human agency within a timeless domestic and absent a historico-social context. The questions of life, death, love, friendship, betrayal are revealed as universal questions of human existence. In this the text of *Bruno's Dream* closely mirrors the ethical modelling of individual action in philosophy and jurisprudence, posing dilemmas which relate purely to the interplay of cause and effect, of human action and response, without recourse to overt implications for the broader political context. In addition, the book offers this modelling via a simplistic, non-didactic fabular style which conceals the philosophical significance of the project. Utilising an unusually conscientious philosophical discourse, the messages are deeply accessible, avoiding canonical references, using simple language and a dialogic rather than dialectic or didactic style, inviting reader interpretation at variable levels of awareness. Uncluttered by historical, literary, or other epistemological references, the reader is invited simply to engage with the domestic moral questions in play.

Producing an exercise in the link between the individual and the domestic community, ethical and moral questions are embedded in what appears to be a relatively trivial and banal setting. The text can be read both horizontally, as a study of the web-like structure of relationships and responses ramifying out from the drama of the central character of the terminally ill Bruno, and vertically, as a series of ethical challenges facing each character. This approach in itself creates an ethical location. That the moral life can be experienced and critiqued on an isolated, individualist plane is clear; how it will impact upon the broader social context less so, but that it *will* so impact is incontrovertible. Even if one cannot predict *all* the outcomes of such impact, the text is a useful device in examining possible effects.

Bruno's Dream is not 'about' a dream. It is a philosophical treatise upon moral life, in the realisation that material life – with all its petty jealousies, intrigues and power play – certainly on an individual plane – takes on, at the moment of death, the distant quality of a dream.

ETHICS IN THE VERTICAL PLANE

In the vertical plane, *Bruno's Dream* may be read as a series of moral challenges, exercised upon particular characters. The potential 'objectivity' of the exercise is thus immediately modified, or derogated, by the 'particularity' of the characters – another ethically significant point. Each character, according to levels of perceptiveness, is more or less 'receptive' to the ethical implications of their challenge, and each may therefore be 'placed' within a register of ethical 'growth'. Bruno is the embodiment and symbol of the fact of death, both to himself and others: whatever the attitudes held by various characters, Bruno's presence is a cogent reminder that the fact of death alters the perspective of life. For Bruno himself (and for the reader, and those around him) the *materiality* of his physical decay informs the confrontation with the moral life. As the following quotation demonstrates, the novel's engagement with the materiality of the

body, with the materiality of death, is stark, the physical 'shell' stripped of illusory visions of a 'supraphysical' humanity, of occupation of a superior metaphysical realm absent crude physicality. The moral warning read not merely *inwards* – to the dying Bruno contemplating his life in the context of his imminent death, but *outwards* – to his 'mortal' companions and the reader / student practitioner of ethics shielded routinely from life and death. The text invites a reflective *and* reflexive reading: we observe Bruno, and later other characters, and identify ourselves; we observe domestic relations and see the crucible of politics.

Bruno has been unfaithful to his wife and is now estranged from his son, having once made a racist remark about his son's choice of wife. Yet now, with:

> ... his hands ... aged ... two twisted dried-up heavily spotted things upon the counterpane ... it was not just the smell, it was the look. He knew that he had become a monster, animal-headed, bull headed, a captive minotaur. He had a face now like one of his spiders ... Below the huge emergent head the narrow body stretched away, the contingent improbable human form, strengthless, emaciated, elongated, smelly ... his body was indeed a tomb, a grotesque tomb without beauty ... (p 11),

the meanings and motives for his actions appear to have been not only spurious but illusory:

> What had happened to him and what was it all about and did it matter now that it was practically all over, he wondered. It's all a dream, he thought, one goes through life in a dream ... Death refutes induction. There is no 'it' for it to be all about ... all the effort which he had put into making himself seemed vanity now that there were no more purposes ... (p 13).

Nevertheless, even in death, the fallible Bruno remains in thrall to affective facets of his life – resentment of his dead father, the sense of happiness derived from memories of his mother, his pathetic inability to face full responsibility for his actions:

> He hadn't meant it anyway, it was just something he'd said once about not wanting a coloured daughter-in-law ... (p 39).

Both Bruno and his son, Miles, fail in the opportunity to be reconciled to one another: each is incapable of 'breaking through' the veil of their discrete limitations. Bruno's recriminatory:

> Why did you come here to be so unkind to an old man? You never loved me, you always sided with your mother ... (p 111),

is met with an equally perverse blindness –

> Miles ... did not want to go through the rigmarole of forgiving and being forgiven. It would all be playacting. It would be something hopelessly impure (p 67) ... He was utterly defiled ... (p 111).

Nor can Bruno achieve greater wisdom through his relation to an idea of God, for it is an unstable relationship, an amorphous idea, sometimes hinting at cosmological design – a classical theology model; sometimes at a punitive father and sometimes an expression of threatened libido – both aspects of social and psychoanalytic models. With the persistence of ego and additional disorientating factor of kinetic rather than static spiritual life, itself

subject to the demands made by life *upon* the subject, the spiritual fails to provide an adequately consistent point of reference for arachnophilic Bruno:

> ... and the young spiders live through the cold by eating their mother's dead body. One can't believe that's an accident. I don't know that I imagined God as having thought it all out, but somehow He was connected with the pattern ... He was those spiders ... I was a radiant youth. I was deeply touched by myself ... Afterwards He became less, He got drier and pettier and more like an official who made rules ... a kind of bureaucrat making checks and counter-checks. There was no innocence and no radiance then ... very occasionally I met Him again ... in country churches ... He wasn't an official any longer. He was something rather lost and pathetic, a little crazed perhaps, and small ... Perhaps God is all sex. All energy and sex ... it wouldn't matter if He was all sex ... (p 96).

Bruno is needy rather than giving, pathetically (and humanly) revived by a woman's reassurance that he's 'still attractive'; thus he remains unable to achieve *authentic* relationships with others. At the very last however, Bruno is alive to the rational implications of his past in the light of imminent death, even though he has proved incapable of translating such rationality into action – he is the personification of human frailty:

> I have lived for nearly ninety years and I know nothing. I have watched the terrible rituals of nature and I have lived inside the simple instincts of my own being and now at the end I am empty of wisdom ... The spider spins its web, it can no other. I spin out my consciousness ... but its all a dream. Reality is too hard ... It looks as if it would have been easy to be kind and good since its so obvious now that nothing else matters at all. But of course then one was inside the dream ... (pp 280–81).

The interactions between Bruno's spiritual growth and his personal limitations inform the tensions – sometimes adverted to in legal analysis but for the most part disregarded – engaging the moral agent. Though reductive of the text, similar analyses may be made of each character inhabiting the 'community' of the novel. Miles, Bruno's son, is educated, debates philosophy and writes poetry. He holds sacred the memory of Parvati, his dead Indian wife, who, young and clever, had held an 'oriental ability to see that everything was, from a certain point of view, everything else', a capacity which 'baffled and charmed his Aristotelian western mind' (p 56). Yet despite these intellectual stimuli Miles is, like his father, easily prejudiced and an avid 'utilitarian' for whom – somewhat ironically in an aspiring poet – 'emotion' is 'messy' and confrontation, with death, with the past, not a source of growth, but of 'defilement' in his orderly world.

In contrast, Danby is a sensualist who romanticises, a not entirely reliable 'charmer', a man who allows himself to be directed by the contingent, who can be compassionate and obstinate, sensitive and short-sighted:

> Danby usually despised men with uneven teeth, but Miles's were rather impressive ... (p 73).

Yet, as a man of conscience and humility, Danby is capable of spiritual growth, *responding* to the moral implications of his actions:

> He felt obscurely the dividedness of his being, the extent of what was gross, the littleness and value of what was not. But these thoughts, when they came, were never entirely clear to him and he spent most of his days in a coma of misery ... (p 227).

Least capable, and perhaps least well placed to exert influence over her own and others' lives is Adelaide, Danby's mistress, uneducated, of poor status, lacking social graces. Though outwardly living an established routine, Adelaide:

> ... lived in a perpetual state of anxiety in a world of important signs the exact bearing of which constantly eluded her. She lived like an animal, seeing nothing clearly beyond her immediate surroundings, hiding at movements, sniffing, listening, waiting ... Danby's quiet lazy comportment, his preoccupied smiles and unaccountable defections, although she ought by now to have been used to them, were read in trembling as one might try to read one's death sentence in a foreign language ... She felt like something very small which rattled around somewhere near the bottom and could quite easily fall out of a hole without anybody even noticing ... (pp 123–24).

Early attempts to stamp her existence and identity upon her surroundings have been strangely impotent, and ultimately she bows to the lure of agency relinquished, of being overmastered by another.

Informing these personas are two sets of siblings, the twins Nigel and Will and sisters Diana and Lisa. Nigel and Will are strongly symbolic, avowedly representing, respectively, the 'poles' of 'spirit' and 'baseness' in man. Nigel maintains a selflessness and self-effacement, his role is to enlighten others, whilst Will is selfish, avaricious and vengeful. In his role as a source of enlightenment, Nigel may prompt the spiritual growth of others:

> Let them trample over you in their own way ... Perhaps they have done the right thing, though they have done it proudly, riding on horses. Their pride has its little necessities. See and pardon ... (abandon pride) ... Let it fall away like a heavy stone ... they have just decided to do what will make them flourish ... A human being hardly ever thinks about other people. He contemplates fantasms which resemble them and which he has decked out for his own purposes ... (p 222).

Nigel also acts as a constraint upon Will, endorsing the necessity that man's base excesses be curbed:

> Of course violent men get put into cages and stretched on racks by men who are less violent but more clever. It's the only way to make them listen ... you are the other half of myself, a weird brutish alien half, doubtless a lesser half, but connected to me by an ectoplasmic necessity for which love would be too weak a name ... you need me as the brute needs the angel ... any juxtaposition of brutish material and spirit involves suffering ... (pp 195–96).

In this complex play between the base and the divine, between confessor and legislator, Nigel approaches an incarnation of the divine and as such, though primarily a force for good, he is a source of moral dubiety and paradox. The very substance of good – whatever its origin, holds dualistic properties:

> *Love ... is our only significant activity. Everything else is dust and tinkling cymbals and vexation of spirit. Yet ... what a trouble-maker it is ... the worthless can love the good ... love knows no conventions ... my very great love was a very great destroyer. If I had been the saint that I could be I would have loved you and let you know it and stayed near you and done you no harm at all, surrounding you like the harmless air and making you almost not notice how much I loved you. As it is, the unpredictable force of that immense angelic thing ... to have you both before me pointing loaded pistols ... how absolutely, when it came to it, you were both of you clay in my hands ... But I*

> *must not think about my godlike power … Not knowing the outcome was … Russian roulette of the soul …*[4] (p 263).

This passage provides a powerful critique of the notion of divine power – if there is such a power, if it walks amongst us and affects our actions, its force is neither neutral nor entirely positive. This is not linked so much to man's failing – as with the punitive model of the divine culled from Genesis – but to the quixotic nature of a force, however initially created for good, when that force is combined with a willed energy which invests an interest in the destiny of man. Yet at an earlier stage in the book, the meditation on Nigel suggests his relation to the *existential* threat posed by life and death, the call for diminution of self:

> In the beginning was Om, Omphalos, Om Phallos, black undivided round devoid of consciousness of self … Nigel, the all-seer, the priest, the slave of the god. Time and space crumple slowly … love is death. All is one … The presence is agony, punishment stripes, the extended being tortured into a single point. Annihilation. *All is one*. Later, far away in another world, an old man calls out calls out, then weeps alone in the dark slow hours of the night … (p 29).

The other sibling pair in the book, Lisa and Diana, hold additional contrasting forces. Diana is practical, instinctive, domestic; Lisa spiritual and intellectual, spurning the material. Diana has focused her life upon love, upon the 'rescue' of a needy man, Miles; the challenge facing her is the discovery that she barely exists for him. A 'shadow beside the solid reality of her sister' (p 64), Lisa's commitment to spiritual growth directs her moral life; though a magnet to others, she abrogates personal desire in the service of right, not only in matters of love, but in her experience of death.[5] It is Lisa who can overlook Bruno's physical decay, show him love and lead him towards some degree of insight:

> When one tries to get a really clear memory one's usually doing it for some definite purpose, for revenge or consolation or something … Human beings are not demons. They are much too muddy … Brooding about the past is so often fantasy of how one might have won and resentment that one didn't … A demon wouldn't feel this. Don't you see that you can't get it all clear? … (p 164).

Though not Lisa's spiritual equal (she has to overcome her feeling of distaste for the sights and smells of Bruno's body, for example, where Lisa is unperturbed) Diana is capable of profound moral growth. Though some may *begin* with a spiritual advantage, it is as much the openness to moral growth that matters. She overcomes her fear of the physical, though aware of its appalling scope:

> She felt rather less physical horror of him, but the smell was hard to bear and she had a terrible intuition of his inward parts and of his pitiable mortality … (p 212),

and ultimately learns not only to relinquish the claims of the material and of sexual love, but to embrace the effacement of self that is the mark of true moral disinterest; an effacement replete with portents of existential clarity:

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4 Original emphasis.

5 Conradi summarises the trajectory of these two characters and their symmetry of moral growth ((1986), p 101): 'Diana moves from the cave toward the sun, Lisa returns to the cave, a journey about whose necessity The Sovereignty of Good is eloquent.'

> And now, she thought, I have done the most foolish thing of all, in becoming so attached to someone who is dying. Is this not the most pointless of all loves? Life loving death itself … Then she began to notice that everything was looking different … a more august and terrible pain than she had ever known before … she saw the ivy leaves and the puckered door knob, and the tear in the pocket of Bruno's old dressing gown with a clarity and a closeness which she had never experienced before … (p 284).

Yet the existential glare squarely indicates a route towards realising the human potential for moral victory:

> Things can't matter very much, she thought, because one isn't anything. Yet one loves people, this matters … They will flourish and you will watch them kindly as if you were watching children … She lived the reality of death and felt herself made nothing by it and denuded of desire. Yet love still existed and it was the only thing that existed … (p 286).

The depiction of a spectrum of human qualities ranged against a variety of contingent forces and the constant presence of death provides a novel overview of human moral life. Though this text presents a 'universalised' vision of the pursuit of virtue in the face of mortality, drawing a conclusion regarding the implications for the moral life is problematic, for in respecting the categorical imperative – that everyone should be treated as ends in themselves – the 'relegation' of selfhood seems to carve the path to fatalism. For philosophy and jurisprudence the spectrum of human qualities pleads a compassionate view of the moral life – of persons either trapped within their purblind personas or groping towards spiritual growth.

THE HORIZONTAL PLANE

In any practical ethics model of moral agency, even in the novel form, there is a danger that moral agency will be portrayed in isolation, viewed not as an *interactive* force but as a metaphysical form. Indeed, justified or not, this charge has been levelled at liberal theory by feminist theory – that no man is an island; he is not subject but *intersubject*. Murdoch draws attention to this issue in her portrayal of moral agency – words and actions do not merely *personify* or *promote* a moral position, they in turn affect the purview of others. Though each character embodies the interplay between contingent moral challenge and moral frailty, this in turn creates new contingencies and challenges to others, who in *their* turn respond according to their gifts or limitations: it is the flutter of a butterfly wing reverberating through the community. Though uncommitted to any political position, the text clearly warns that our thoughts and actions define not only ourselves, but impact upon others: it is a profound moral responsibility, recognising as it does that words and actions carry comparably heavy burdens in terms of their moral impact.

THE MORAL, THE MORTAL, THE MATERIAL

Bruno, as a living and ever-present 'embodiment' of death, provides an additional, crucial factor in the model of moral life. As each character reflects variable ethical responsiveness to the contingent challenges of life, the mortal presence of Bruno, the *immanence* as well as

imminence of death sharpens the significance of moral progress or stasis. Mortality is for humanity a universal constant; any moral decision made in flight or denial of this constant is a dereliction of moral life and of life itself. Death is arbiter of the commensurable and incommensurable in life, over-absorption in material contingencies a self-deception. The free and responsible person each determining his or her moral development – the 'existential' agent – is focused by the presence of mortality and *constrained* by personal ethical potential (rather than the reverse). In becoming attached to one who is dying, 'the most pointless love of all', 'life loving death itself', seeing with 'clarity and closeness' the 'puckered door-knob', the 'tear in the pocket', Diana attains an 'existential' authenticity in relation to the mortal and material. No divine or mythical illusions as to self or other assuage her encounter with the real; she is free to realise the impartial ethical self.[6]

This philosophical ideal is of escape from the flickering contingent, the shadows of material deceits on the cave wall towards the 'light' at the entrance. Far removed from the pressing materiality, oppressive physicality and pre-eminent conflict between self and other characterising everyday life and everyday law, it is a secular vision of inner divinity. It is perhaps a luxuriant aspiration for the individual agent, keeping the mortal and the material properly in focus in the pursuit of normativity, from fact to value, from event to obligation. Law similarly aspires to such balance between 'is' and 'ought', but in addition to utilitarian concerns the *threat* of the mortal and the *promise* of the material impose contrasting constraints upon the normative in law. Most significantly, the law must *mediate* the collision between fact and value that *is* the individual agent.

Where the moral life of the individual is *exposed* in *Bruno's Dream* via vertical and horizontal moral registers, paradox in the particular remains largely unexplored. Indeed divesting Diana of desire, her effacement of ego may be an ultimate aim in terms of personal moral perfection. Yet it sails dangerously close to fatalism, perhaps to *neutralisation* of the individual if transferred to the civic sphere: Diana's enlightened vision meets Rawls' veil of ignorance – both enriching aspirational images, both endangered by their evasion of the particular. Nevertheless as enriching image, exploration of the moral life in *Bruno's Dream* remains valuable. The minimisation of the material and contingent is carried through in the minimisation of gender in identity. As the ensuing discussion bears out, this provides an additional resource in the exploration of ethical models of moral agency now current in theory.

'UN'GENDER AND THE ETHIC OF CARE

A hotly debated issue in the decade following the publication of *The French Lieutenant's Woman* and *Bruno's Dream* was whether women exhibited different cognitive moral development to men. The debate is of course ancient,[7] but notoriously cemented following Kohlberg, and Gilligan's response (Lawrence Kohlberg purported to derive

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6 There are contestable possibilities in the view proposed by Conradi that (Conradi (1986), p 98): 'Murdoch suggested that death was to be considered not so much as a "terribly special" event at the end of life, but as something that could happen all the time, in the sense of unselfing.'

7 Eg, the hypothesis of 'moral insanity', prevalent in the Victorian period, was distinctly gendered in its conception. For a collection of documents concerning such issues, see Hamilton (ed) (1995).

empirical findings of (superior) moral reasoning powers in boys contrasted to girls: Carol Gilligan responded that the reasoning powers were merely 'different' – for an excellent summary and discussion of this debate, see Morrison ((1997), pp 497–503)). In exploring and defending the valid yet 'different' rational approach to moral dilemmas adopted by women, Gilligan concludes that their vision of conflicting responsibilities is resolved through 'care' as opposed to masculine modes of resolution through 'rights' and 'justice'. Thus, so theory claims, men primarily model moral synthesis via notions of 'justice' and 'rights', women via an 'ethic of care'. Several conclusions have ensued from these propositions, conclusions primarily in the realm of feminist theory: that women conceive themselves relating to others in terms of *relationship* rather than *domination*, to a 'network' of relationships rather than hierarchies.

The difficulty thrown up by such theory is that whether woman *essentially* ('naturally') adopts such strategies, or is socialised – 'nurtured' to so do is likely to be a problem resistant to investigation. In the mean time, what initially seems a fair response to Kohlberg's conclusion – with positive implications for the rational capabilities of women – may rapidly be recast as negative.[8] The *possibility* of being a more 'natural' carer – even though in terms of moral virtue a lofty altruistic characteristic compared to the hierarchical power-seeker, may perpetuate the 'location' of woman in a second-order 'supportive' rather than pro-active civic persona: morally first order, socially vulnerable to second order. Though several feminist theorists have argued that the 'feminine' ethic of care signals a way forward for legal paradigms – (Smart (1989)) it would be difficult – perhaps impossible given 'universal' *human* inequalities (intellect, inclination, gifts) – to create social and political structures entirely cleansed of hierarchy. An acceptance of the healthily competitive aspects of human nature should be combined with a rejection of the exploitative. Gilligan herself concludes that proper social development of *both* sexes would engender a balance between the ethic of care and rights.

Bruno's Dream assists in shifting the conception of this model. Gender – quite deliberately it would seem – is depicted as itself secondary, perhaps incidental, to the moral potential of individuals. They are first *persons*, with characters tending to a disposition for moral growth and connectedness – or not – and *then* 'gendered' persons. As will be seen, this dovetails with the *fractured* approach taken by Fowles in *The French Lieutenant's Woman*. There, cultural assumptions about self and other – even the apparently intransigent assumptions concerning 'natural' qualities – are stripped away to reveal the person; here we are permitted to see that gender, beginning as a political issue, has become unnecessarily dominant philosophically. The 'classical' questions of philosophy and jurisprudence – of how we organise society, how we deal with inequalities in gifts and behaviour – are now and have always been, questions for all *persons*. The difficulty for both men and women has been to bring complete *imaginative* as well as cognitive recognition to the primacy of personhood in women. For example, the 'ethic of care' model of women can be hijacked all too easily in service of the argument that women who are naturally competitive, or who do not wish to take a primarily 'nurturing' role, or who seek abortion, are 'unnatural'. *Bruno's Dream* quite deliberately depicts some women *and* some men as more inclined to care, nurture, conciliate, whilst

8 Again, see Morrison's summary. The issue has been extensively discussed; see, eg, Williams, J (1989); Bender (1990).

others incline to dominate and control. Nor are these inclinations necessarily delineated clearly. Bruno himself, even in the face of death, is needy yet dominant, unforgiving yet remorseful. His primary carer Nigel is empathic and spiritual to the point almost of saintliness, although even he is aware of the destructive aspects, the sheer power and manipulative force, of love and care. Together, the characters present a moral spectrum – men *and* women, rather than a moral divide, exemplifying Gilligan's ambition that society words towards the development of the full spectrum within each individual. And each individual occupies a place on a spectrum or register (rather than a divide) of gender inclination which is merely a *factor* informing moral and social identity.

In addition to this model however, *Bruno's Dream* adds an additional observation regarding moral identity, an observation which has implications for normative structures in domestic and community spheres, for the private moral life and for law. As explained, individuals are located primarily as persons rather than *gendered* persons. As well as occupying a gender 'register' in terms of how far they diverge from traditional gender stereotypes, for example, the 'nurturing' male, the 'competitive' female, each person also occupies a place in terms of the 'register' of moral responsiveness. In so far as *Bruno's Dream* is a development of Plato's metaphor of the cave, it is a seemingly 'trite' observation that some occupants are more acute in 'interpreting' the shadows on the wall than others. This acuity is as much a *temperamental* as intellectual – or gender – skill, and regardless of intellect the temperamental element either facilitates or stultifies the ability of the person to engage in moral development. Such a model of humanity – personhood first, gender second, variable positions on the moral 'register' – is radically different from the classical models erected by law of polarised male and female, good and evil, of a uniformly inherited free-will and understanding of moral responsibility. Furthermore, the practical ethics 'laboratory' created in the text of *Bruno's Dream* allows engagement with this ethical 'model' of persons in terms of *unfolding narrative*. In other words, formulaic 'fictions' of the reasonable man, the free-willing agent, products of apparently 'spontaneous' generation, are here explored *developmentally*. In his encounter with law, man is traditionally treated as the immaculately conceived, fully equipped and virtually equal grappler with life's fortunes. Social and intellectual inequalities have provided little or no aid to law in formulating a more accurate view of man, for as jurists are ready to note, such inequalities may indicate *trends* but they do not determine outcomes. Neither social or intellectual disparities are clear indicators of the moral life; each person is according to the law, ultimate arbiter of his destiny. Pragmatism – the need to have identifiable rules of social engagement – crystallises this vision. Yet Murdoch's model poses a philosophical and experiential challenge to this static human production. Simply – social and intellectual variants apart – some persons are more capable than others of internalising moral lessons, they are in dynamic relation to the moral world. Such individuals are more adaptable, more flexible in terms of accommodating the difference of others, more likely to empathise with the rights of others. Such flexibility means that, even if their social or intellectual conditions deprive them of such insights *initially*, their position on the register of moral development as *moral learners* will enable them to accommodate new insights. Conversely, whatever their social or intellectual advantages, some individuals are *temperamentally* resistant to such growth. Miles, the poet and philosopher, is intransigent and static in terms of personal relations – he cannot see that his abstract and aesthetic insights hold direct implications for his practical ethical life. We

are made to understand that, even when his personal epiphany dawns, the floodgates of his poetic soul re-open, he experiences an enlightenment which is in fact limited and illusory. The universally profound message held by the shadows in the cave is for him profound only immediately, instrumentally.

Kohlberg and Gilligan develop their analyses from the standpoint of empirically based psychology, both however reaching contrasting – perhaps on some readings even opposing – conclusions. Similarly, *psychological* models of human behaviour could well account for the variations, the 'registers' herein described. But as Kohlberg and Gilligan show – even with the support of empirical evidence, resulting hypotheses can differ markedly. Against the context of social, economic and intellectual variants, seductively measurable yet notoriously resistant to scrutiny, the development of legal notice regarding 'good' and 'poor' learners in the moral spectrum may seem equally impracticable. The 'test' of responsiveness is contingent moral challenge, and full assessment only feasible in terms of a lifetime. The jurist and the judged are embarked upon the same journey, the one perhaps no better equipped – save his doctrinal guidelines – than the other. Yet the practical ethics model raised by Murdoch presents a feasible synthesis of the lacuna left between fact and value. The world of science and empiricism, the pseudo-science of legal doctrine, may burst with quick sulphurous light upon the shadows in the cave. But it is in philosophy, in the marriage of philosophy and law that is jurisprudence, that the realm of human possibility must be continuously re-explored, the 'responsible human agent' monitored, the boundary of nature and nurture questioned. And if the first order of personhood precedes that of gender in ethical terms, it behoves each person to consider their role in the world of events.

THE FRENCH LIEUTENANT'S WOMAN

Both *Bruno's Dream* and *The French Lieutenant's Woman* share a perception of 'existential' time, of its distortion by subjective perception and disregard of subjective 'reality' – of 'real' time and notional time. Though existential philosophy is strongly associated with the 1940s and 1950s, these two books at the close of the 1960s produce complementary and sophisticated responses to the challenge to ethics posed by existential consciousness. *Bruno's Dream* is a minute examination of interpersonal domestic ethics; through the prism of the particular its moral questions are universal. *The French Lieutenant's Woman* foregrounds the existential critique of belief systems: here, doubt concerning the reliability of apparent 'universals' leads back to a new ethical conscience in the conduct of the particular. Thus, in contrast to *Bruno's Dream*, a major motivation in the writing of *The French Lieutenant's Woman* is the charting of the development of existential consciousness and its ramifications for our moral life.[9] The text is therefore careful to signpost the

9 Of writing the novel, Fowles explains (Fowles (1990), p 151):

> My two previous novels were both based on more or less disguised existentialist premises. I want this one to be no exception; and so I am trying to show an existentialist awareness before it was chronologically possible. Kierkegaard was, of course, totally unknown to the British and American Victorians; but it has always seemed to me that the Victorian Age, especially from 1850 on, was highly existentialist in many of its personal dilemmas. One can almost invert the reality and say that Camus and Sartre have been trying to lead us, in their fashion, to a Victorian seriousness of purpose and moral sensitivity … Nor is this the only similarity between the … [cont]

philosophical, literary and cultural influences informing this process. The approach is unavoidably didactic,[10] charting a journey through the canonical thinkers who have shaped the time – indeed, 'the time' – historicity, and historiography – is a key issue for the book, unlike *Bruno's Dream*. 'Fracturing' the conventions of the 'realist' text, of history as teleology, with cross references to unforeseen later developments – to 'retrospective' insights into earlier 'certainties' presents a reflexive mirror to present time. The danger of obsolescence hanging over Charles, a central character of the book, is indicated by references to Darwin, whilst the immanence of cultural and political change is signalled by references to Marx:

> Charles knew nothing of the beavered German Jew quietly working, as it so happened, that very afternoon in the British Museum library; and whose work in those sombre walls was to bear such bright red fruit ... (p 15) ... Charles called himself a Darwinist, and yet he had not really understood Darwin, but then, nor had Darwin himself ... He knew that *nulla species nova* was rubbish; yet he saw in the strata an immensely reassuring orderliness in existence ... (p 47).

The very fact that the 'characters' – including Charles himself – are 'representations', a projection of reality, is underscored by the invocation of Robbe-Grillet and Barthes:

> If I have pretended until now to know my characters' minds ... it is because I am writing in a convention universally accepted at the time of my story ... But I live in the age of Alain Robbe-Grillet and Roland Barthes ... (p 85).

EXISTENTIALISM AND THE STRICTURE OF 'GENDER' UPON 'PERSONHOOD'

The existential threat, and hope insinuated into the comforting and concrete 'reality' offered by the Victorian novel form, is itself a critique of collective as well as individual moral apathy:

> Over dressed and over equipped ... They sensed that current accounts of the world were inadequate; that they had allowed their windows on reality to become smeared by convention, religion, social stagnation ... (p 46) ... After all, he was a Victorian. We could not expect him to see what we are only just beginning – and with so much more knowledge and the lessons of existentialist philosophy at our disposal – to realize ourselves: that the

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9 [cont] 1960s and 1860s. The great nightmare of the respectable Victorian mind was the only too real one created by the geologist Lyell and the biologist Darwin. Until then man had lived like a child in a small room. They gave him – and never was a present less welcome – infinite space and time, and a hideously mechanistic explanation of human reality into the bargain ...

10 Hutcheon, introducing the development of postmodernism in literary theory, gives context to the practice of writers of the time, including Fowles (Hutcheon (1988), pp 43–45):

> The postmodern is in no way absolutist ... What it does say is that there are all kinds of orders and systems in our world – and that we create them all. That is their justification and their limitation. They do not exist 'out there', fixed, given, universal, eternal; they are human constructs in history. This does not make them any the less necessary or desirable. It does, however ... condition their 'truth' value ... The point is not exactly that the world is meaningless ... but that any meaning that exists is of our own creation ... The plot structure of *The French Lieutenant's Woman* enacts the dialectic of freedom and power that is the modern existentialist and even Marxist answer to Victorian or Darwinian determinism. But it requires that historical context in order to interrogate the present (as well as the past) through its critical irony.

> desire to hold and the desire to enjoy are mutually destructive (p 63) ... Lyell's *Principles of Geology* ... blew like a great wind ... through the century's stale metaphysical corridors ... Genesis is a great lie; but it is also a great poem; and a six thousand year old womb is much warmer than one that stretches for two thousand million ... (p 140).

The realisation that nature reveals the contingent as forcefully as order colours the individual's response to social practice: the empty fossil 'shell' mirrors Man:

> ... the ammonites caught in some recession of water, a micro-catastrophe of ninety million years ago ... evolution was not vertical, ascending to a perfection, but horizontal ... All those painted screens erected by man to shut out reality – history, religion, duty, social position, all were illusions, mere opium fantasies (p 178) ... (produced) a wild determination to make some gesture that would show he was more than an ammonite stranded in a drought ... (p 181).

The individual is left not only with a heightened sense of his own agency but of its magnitude even in minor decisions:

> ... and the 'I', that entity who found such slickly specious reasons ... he felt intolerably excited by the proximity of the moment of choice. He had not the benefit of existentialist terminology; but what he felt was really a very clear case of the anxiety of freedom ... being free is a situation of terror ... (p 295).

An age built upon elaborate and impervious belief systems – whether it be 1867 or 1967 – affords to its citizens the luxury of illusion. *The French Lieutenant's Woman* pays much attention to the illusions (relevant to the 'screening out' of reality – the shadows on the wall of Plato's Cave, the 'existential' struggle) derived from gender stereotypes:

> It seemed clear to him that it was not Sarah in herself who attracted him ... but some emotion, some possibility she symbolized ... Ernestina ... after all she was only a woman. There were so many things she must never understand: the richness of male life, the enormous difficulty of being one to whom the world was rather more than dress and home and children. All would be well when she was truly his; in his bed and in his bank ... (p 114).

> ... as if all her mystery, this most intimate self, was exposed before him; proud and submissive, bound and unbound, his slave and his equal ... (p 301).

At times the narrator (or Fowles?) reverts to such assumptions even whilst trying to subvert them. Though the text on the one hand admonishes the academy:

> The Old Fossil Shop, founded by the remarkable Mary Anning, a woman without formal education but with a genius for discovering good ... specimens ... one of the meanest disgraces of British palaeontology is that although many scientists of the day gratefully used her finds to establish their own reputation, not one native type bears the specific *anningii* (p 44),

on the other it romanticises and therefore *limits* feminine potential:

> She could sense the pretensions of a hollow argument, a false scholarship, a biased logic when she came across them ... she saw them as they were and not as they tried to seem ... Without realising it she judged people as much by the standards of Walter Scott and Jane Austen as by any empirically arrived at ... (p 50) ... Sarah ... had no theology; as she saw through people, she saw through the follies, the vulgar stained glass, the narrow literalness of the Victorian church ... I cannot say what she might have been in our age; in a much

> earlier one I believe she would have been either a saint or an emperor's mistress. Not because of religiosity on the one hand, or sexuality on the other, but because of that fused rare power that was her essence – understanding and emotion … (p 54).

For the most part, however, the text clearly indicates that gender assumptions impose constraints upon masculine as well as feminine identity:

> … a presumption of intellectual equality (therefore a suspect resentment against man) was less an equality than a proximity, a proximity like a nakedness … the feeling was not of male envy: but very much of human loss … (p 159) … It was not a smile one could stiffen or frown at … It lay claim to a far profounder understanding, acknowledgment of that awkward equality melting into proximity than had been consciously admitted … like a man who at last comes, at the end of a long high wall, to the sought-for door … but only to find it locked. For several moments they stood, the woman who was the door, the man without the key … (p 162).

The prison has been erected both by the culture and its language:

> I say 'her', but the pronoun is one of the most terrifying masks man has invented … (p 287),

and whilst this undoubtedly places woman in an invidious position:

> … all those loathsome succubi of the male mind, their fat fears of a great feminine conspiracy to suck the virility from their veins, to prey upon their idealism, melt them into wax and mould them to their evil fancies … (p 307),

ultimately it prevents man, the social engineer, the fount of ideas, from authentic relations with the 'Other' ('he became increasingly unsure of the frontier between the real Sarah and the Sarah he had created in so many such dreams: the one Eve personified, all mystery and love and profundity, and the other a half-scheming, half-crazed governess from an obscure seaside town … nothing in her but his own folly and delusion' (p 367)) and with himself:

> … the formality of his language … betraying on the one side a hollowness, a foolish constraint … an artificiality of conception … (p 384),

for as long as primacy is ascribed to gender over personhood, the potential in humanity is proscribed.

REFLEXIVE TEXT: CONSCIOUS AND UNCONSCIOUS HISTORICITY AND THE ABORTION ACT

So far, we have visited aspects of the text in *The French Lieutenant's Woman* which demonstrate a sensitivity to sexual stereotyping, to the influence of cultural practice and dominant epistemologies and the implications for personhood. This, with the 'existential' sensibility of the book provides the groundwork for aspects of the text which have surprising links to legal theory. 1867, like 1967 was a time of duality of values: just as the 1960s claimed 'liberation' for women, with contraception and abortion becoming accessible, so too this made women more sexually accessible to men, an accessibility which was not necessarily accompanied by heightened autonomy for women and with

sexual availability heralding conflicting feelings and motives in the relation between the sexes.[11] Feminist writers have latterly considered to what extent such 'liberation' simply served to perpetuate values whereby women embodied units of masculine consumption rather than autonomous sharers of power. Such duality was just as evident, though more polarised (and retrospectively, perhaps the more identifiable for that) in the 1860s:

> An age where woman was sacred: and where you could buy a thirteen year old girl for a few pounds ... Where more churches were built than in the whole previous history of the country; and where one in sixty houses in London was a brothel ... where there was an enormous progress and liberation in every other field of human activity; and nothing buy tyranny in the most personal and fundamental ... (p 231).

As an educated person, Charles constantly struggles with the ideas which shape his time and his values. We are told:

> It is true that to explain his obscure feeling of malaise, of inappropriateness, of limitation, he went back closer home – to Rousseau, and the childish myths of a Golden Age and the Noble Savage. That is, he tried to dismiss the inadequacies of his own time's approach to nature by supposing that one cannot re-enter a legend (p 63) ... Charles ... shared enough of his contemporaries' prejudices to suspect sensuality in any form; but whereas they would, by one of those terrible equations that take place at the behest of the super-ego, have made Sarah vaguely responsible for being born as she was, he did not ... Darwinism, as its shrewder opponents realized, let open the floodgates to something far more serious that the undermining of the Biblical account of the origins of man; its deepest implications lay in the direction of determinism and behaviourism, that is towards philosophies that reduce morality to a hypocrisy and duty to a straw hut in a hurricane (p 105).

This quotation encapsulates the bifurcation of theory. Scientific knowledge, with the potential for illumination of problems of human existence, becomes placed in opposition to the moral life: the physical obliterates the metaphysical. For the moral theorist, this opposition is relevant to both centuries, to the relative poverty of the nature-nurture debate.

As a summary of the irresistible forces shaping late 19th and 20th century attitudes, such connections can hardly be bettered: Charles is not the simple 'dupe' of competing claims, as some retrospective analysis of 'linear' values, whether those of doctors, lawyers, philosophers, writers, jurisprudes, might lead us to believe. He is simply, as in any particular time, including our own, subject to conflict. Forced to make choices between competing belief systems, he will naturally try to reconstitute and so harmonise them as far as possible in order to maintain his personal beliefs about himself and his relation to others. Nowhere is this more cogently depicted than in the development of Charles's relationship with Sarah, the French lieutentant's woman, nowhere is it more cogently *critiqued* than in his relationship with Dr Grogan, who introduces him to the currents of belief about women then (and to some extent, still) prevalent in medicine. Of Charles and Grogan we are told:

> ... these two men still lived in a world where strangers of intelligence shared a common landscape of knowledge, a community of information, with a known set of rules and

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11 For a discussion of this issue from the socio-legal perspective, see Bridgeman and Millns (1998), especially Chapter 5.

> attached meanings. What doctor today knows the classics? What amateur can talk comprehensibly to scientists? These two men's was a world without the tyranny of specialisation; and I would not have you ... confuse progress with happiness (p 132).

In this, the narrator is combining irony with reflexivity – the prioritising of past over present *informs* both past and current faith in teleology; that we are always progressing, and always progressing *towards* betterment. At the same time, there is irony in the depiction of two enlightened minds communing within the bounds of shared beliefs about themselves. Yet Dr Grogan is not merely a cipher for the link between the repressive beliefs and practices of medicine and those of the broader culture. He is in many respects a progressive, suffering from:

> ... a whiff of corollary nausea for his own time: its stifling propriety, its worship not only of the literal machine in transport and manufacturing but of the far more terrible machine now erecting in social convention (p 129).

This complex account of the link between prevailing knowledge and subjective analysis, between moral values and moral integrity, lays the foundation for the textual account of subsequent events. Charles feels torn between his desire for the prohibited Sarah and his desire to comply with social convention; this leads him into a complex tension between pursuit of Sarah and flight from her; a tension which is apparently resolved by the 'pathologising' of Sarah's motives. Such pathologisation accords perfectly with the epistemological substrates laid down in his mind – the 'scientific' view of the world provided by Darwin, by Lyell's *Principles of Geology*, most of all by Dr Grogan with his accounts of German psychoanalytic 'findings', of similar 'cases':

> There is a clever German doctor who has recently divided melancholia into several types ... natural ... occasional ... obscure ... Dr Hartmann says ... *'It was as if the woman had become addicted to melancholia as one becomes addicted to opium'* ... She wants to be a sacrificial victim, Smithson. Where you and I flinch back, she leaps forward ... You must not think she is like us men, able to reason clearly, examine her motives, understand why she behaves as she does. One must see her as being in a mist (p 134).

THE FRENCH LIEUTENANT'S WOMAN BEFORE THE LAW: THEN AND NOW

Thus we are given an account of the reasoning, educated and enlightened man accommodating and promoting values which seemed reasonable for their time and were understandable given the repressive culture which endorsed masculine prejudices and produced a distortion of female identity and behaviour patterns. Since the text is constantly referring us to the 'present' of the 1960s, it invites the echoes of such attitudes to be tested against that present – there is a 'conscious' historicity and reflexivity at work. In addition, however, this complex interplay between critical text and normative text acquires an additional layer of significance when one considers its potential for 'unconscious' historicity in relation to specific legal issues. Not only has the text given us an account of the processes forming belief systems which entrench the 'superior' subjective – of woman as unreasonable and unreasoning as against the man of reason –

still relevant to the culture of the 1960s. It is given within the *particular* framework of a 'feasible' subjective reasonableness *on the part of* that man of reason.

Although ethics, as endorsed by historical location, are undoubtedly constitutive of all normative thinking, the two-way mirror between the 1860s and 1960s in *The French Lieutenant's Woman* is general not specific: it deals with the complex forces which 'locate' woman as 'illegitimate' citizen. Fowles reflects upon the unwillingness to enfranchise women in the 1860s. By the 1960s, women were formally enfranchised members of the community. Yet the 'liberal' trap which squeezed women's access to 'rights' in the 19th century was still operative. This play between superior subjective and feasible subjective is well demonstrated when placed in the context of a specific law making process. In her article '"Who is the mother to make the judgment?": the constructions of woman in English abortion law', Sheldon (1993) charts the passage of the Abortion Act 1967 through the debating stages. Sheldon identifies:

> ... two major constructions of Woman used within the debates, which may be broadly (though not always consistently) identified with the reformer/opponent split. Thus, I would argue, whilst the reformers represent the woman who would seek to terminate a pregnancy as an emotionally weak, unstable (even suicidal) victim of her desperate social circumstances, the conservatives view her as a selfish, irrational child.

Thus, both the advocates who champion prohibition *and* those who champion liberalisation of access to abortion do so with a tainted perspective of woman. Whilst this is not surprising in terms of the 'pro-life' campaigners, it is more so in considering the 'pro-choice' position. Perhaps, in the context of the 1960s, the advocates still *dare not* erect a model of woman as an autonomous individual with rights – the view of woman as inherently unreasonable and thus undeserving of such recognition still prevailing. But perhaps it is because they themselves – like Charles to some extent, and Dr Grogan – have built their superior subjective, their ethical position, upon a framework of a feasible subjective which is itself inherently illiberal in its assumptions *even whilst occupying the notionally more liberal space*. We may recall this 'liberality trap' which perpetuates discriminatory practice even whilst claiming emancipatory aspirations, in our visit to *Viscountess Rhondda;* it creates ethical stasis easily mistaken for an ethical dynamic. Indeed, this split between liberal theory and practice is clearly flagged by the text of *The French Lieutenant's Woman*:

> In the spring of 1867 ... Mr Gladraeli and Mr Dizzystone put up a vertiginous joint performance that year; we sometimes forget that the passing of the last great Reform Bill ... was engineered by the Father of Modern Conservatism and bitterly opposed by the Great Liberal ... Marx remarked, in one of his *New York Daily Tribune* articles, that in reality the British Whigs 'represent something quite different from their professed liberal and enlightened principles' ... (p 91).

The specific historicity of 1867 has uncanny echoes with the attitudes colouring the legislation of 1967. When the narrator tells us:

> Ah, you say, but women were chained to their role at that time. But remember the date of this evening: April 6th, 1867. At Westminster only one week before John Stuart Mill had seized an opportunity in one of the early debates on the Reform Bill to argue that now was the time to give women equal rights at the ballot-box. His brave attempt (the motion was defeated by 196 to 73, Disraeli, the old fox, abstaining) was greeted with smiles from the

> average man, guffaws from *Punch* ... and disapproving frowns from a sad majority of educated women ... (p 100),

we would search hard in the abortion debates for a champion of such disinterest as John Stuart Mill (contrast David Steel who, Sheldon tells us, in using 'an argument to justify abortion in cases of rape ... implicitly equates consensual intercourse with desired conception. Wanting sex equals wanting pregnancy and motherhood'). But we would recognise the other characters in the age-old moral mummery: the moralist abstaining from an embarrassing issue, the smiles from the average man, the guffaws from popular media, even the 'disapproving frowns from a sad majority of educated women': in the abortion debates, Jill Knight 'plays heavily on the idea of the woman as selfish and irresponsible. She reveals an image of women seeking abortion as selfish, treating "babies ... like bad teeth to be jerked out just because they cause suffering" ... in the House of Lords, Joan Vickers sums up sentiments which are often expressed or implicit in statements of other MPs when she notes that: "I think that most women desire motherhood. It is natural for a woman to want to have a child ... It is only in extreme cases that a woman wants to terminate her pregnancy ..."' (Sheldon (1993)).

The more extreme female opponents of the legislation are mirrored in characterisations in *The French Lieutenant's Woman*, such as Mrs Poulteney:

> I cannot imagine what Bosch-like picture of Ware Commons Mrs Poulteney had built up over the years; what satanic orgies she divined behind every tree ... But I think we may safely say that it had become the objective correlative of all that went on in her own subconscious ... (p 82).

Indeed, at the heart of Ware Commons is a location of great symbolic importance to the text – 'the Undercliff', a dark and womb-like place feeding the subconscious of many other characters; like the forest in *Tess of the d'Urbervilles* a place where girls should not venture. Its significance as a metaphorical dark womb where man is confronted with his fears concerning woman, is enhanced by the fact that it is in this place that Charles is drawn to meet the mysterious Sarah. Quite by chance, as the text 'plays' with the significance of this location, it produces an unconscious yet prescient commentary strangely apposite to woman's body in the context of the 1967 Act:

> It has also, like all land that has never been worked or lived on by man, its mysteries, its shadows, its dangers ... Now (in the 1960s) the Undercliff has reverted to a state of total wildness ... and it is so by Act of Parliament: a national nature reserve. Not all is lost to expedience ... the sounds, the scents, the unalloyed wildness of growth and burgeoning fertility, forced him into anti-science ... only one art has ever caught such scenes ... it does not matter what that cultural revolution's conscious aims and purposes, its cruelties and failures were; in essence the Renaissance was simply the green end of one of civilisation's hardest winters. It was an end to chains, bounds, frontiers. Its device was the only device: What is, is good. It was all, in short, that Charles's age was not ... (pp 62–63).

Just as the 'pathologisation' of women links to a belief in their innate unreasonableness, so the perpetuation of such attitudes explains the inability of participants in the abortion debates to depict women as responsible rights-bearers. Thus, even when the legislation does bestow access to abortion, it is not through the rhetoric of rights, but via a mechanism which decriminalises the operation, provided it is adjudged, by a doctor, to

fall within the parameters of statutory proviso.[12] This summit, between doctors and legislators, finalises the liberal net which disenfranchises women from decisions about their own bodies: the legislation is aetiolated by the belief that such power must be kept in harness, echoing Dr Grogan, who:

> Born in 1801, was really a fragment of Augustan humanity; his sense of progress depended too closely on an ordered society – order being whatever allowed him to be exactly as he always had been, which made him really much closer to the crypto-liberal Burke than the crypto-Fascist Bentham (p 133).

'UN'GENDERED JURISPRUDENCE

The philosophical journey, horizontal and vertical, that is *Bruno's Dream*, provides an opportunity to consider individuals as persons first, prior to any gendered state, each with ethical journeys to travel which are unique to being that person, with those personal traits and weaknesses and these choices – in short, journeys which are unique to the state of being, of existence. Whether any single individual acting within these parameters proves to be a 'caring' individual, an individual with especial empathy realised in an 'ethic of care', pertains not simply to the incident of sexual identity, but to a complex interplay of factors. How persons of either sex deal with ethical challenge will reflect the kinetic and static features of their condition. Overly reductive extrinsic 'readings' of such decisions are likely to reflect less about the ethical status of the decision maker or the decision, than about the preconceptions of the 'reader'. Where those judging the ethical status of a decision look first to the biological identity of the decision maker, allowing that factor to colour all that follows (and regardless of intimate contributors, or contributions to the creation of the dilemma) the judgement itself is by definition of an impoverished ethical cast.

Similarly, the closing sequence of *The French Lieutenant's Woman* presents a cogent ethical challenge to the cultural derogation of feminine identity. Fowles brings into sharp focus the image of man stripped of his cultural mythology and of woman similarly stripped of the garments with which she has been 'positioned'. Layer upon layer of cultural, historical, scientific, political and social values and norms are stripped away

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12 Variations upon this arrangement are reflected across jurisdictions. The discussion the the Pennsylvania State statutory requirement that 'no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she had notified her spouse that she is about to undergo an abortion' led to discussion in *Planned Parenthood of SE Pennsylvania v Casey* (1992) 112 S Ct 2791, reproduced in Kennedy and Grubb ((1994), pp 908–09) that:

> Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence … Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family … It is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual activity would be spousal sexual assault as defined by the Act, many women may not consider it to be so and others would fear disbelief …

These findings reflect the complexity of intimate relationships that on a widespread scale involve sexual coercion or submission that cannot correlate to 'consent' as properly understood. Any ensuing pregnancy may therefore simply reinforce the cycles of coercion and disempowerment already enacted – legislative design contributing the final assault in the cycle.

from the protagonists. Simultaneously, the institutional positions reflected in such values are exposed as supporting the male view of self and entrenching his view of woman. With the logical removal of these defences, Charles is left with an uncertain and vertiginous view of his selfhood and a bewildering image of woman, until now entirely constructed from *institutional supposition*. The last, implacable layer is that binding Charles' sense of selfhood to his 'difference' from woman.

When applied to the specific ethics of abortion, this conception is resourceful. Pro-choice commentators tend to couch critique in terms of the diminution in feminine autonomy signalled by limited access to abortion, denial of abortion as of right perpetuating the infantilisation of women. These are strong arguments and touch upon the very roots of citizenship. Fowles's image of woman, as a person entire, steadily returning the gaze of man – as doctor, philosopher, scientist, husband – is the outcome of literary *philosophical* critique; a conception of a person forced to withhold an aspect of self whilst her dessication is the means of constituting that other. The loss is mutual, as woman is forced to *personify* the insoluble mystery of the axis with nature that is humanity. The ethical dilemma encapsulated by the problem of abortion is insoluble in the sense that rationality cannot produce resolution which does not inflict harm. Both 'deontological' and 'utilitarian' arguments may be construed on either side of the divide – depending on definitions of 'personhood', 'rights' and so on. But the strongest position raised by the 'existential' critique of Fowles echoes, somewhat surprisingly, the philosophy of modern natural lawyers (positivism, value-neutral as it claims to be, might seem a more likely origin for the denial of 'foetal rights' which is attributed to the pro-choice position – in the eyes of classical natural law, the final descent from neutrality to moral nihilism and the life-denying mechanism of abortion). For whilst natural law traditionally has been associated with absolute values and this is carried on in the 'incommensurability' of goods and lives, the *instrumentality* of those goods to notions of human flourishing, especially the human capacity and desire to express identity in the origination, sustaining and completion of projects reminds us of the unflinching gaze of reconstituted woman.

The issue of abortion provides a strong focal point for the concrete examination of jurisprudential abstraction. Uniquely concerned with the conflict between two competing claims, not simply to property or a right to pursue life unmolested, but property in one's own body – to physical integrity itself, it is a 'hard' ethical challenge at the apex between emotivism and rationality.

In 1961 Hart's *Concept of Law* sought to explicate a positivist, value-neutral conception of law: of itself, the model is not designed to be tested for context-particular orientation, but is meant to provide a formula whereby law may be identified. Yet Hart admits that howsoever the formal legal system so constituted will be differently expressed in different cultures, there will be a bedrock of constant minimal rules necessary to the function of society which spring from *human nature* itself. The minimal rules flow, according to Hart, from 'simple truisms' about human nature – human vulnerability, approximate equality, limited altruism, limited resources, limited understanding and strength of will. Hart's resort to 'nature' thus reveals something of his latent position – of law as a minimalist instrument for controlling human excess, as he states himself, social rules confining the pursuit of self-interest are 'at any rate less nasty, less brutish, and less short than unrestrained aggression' (Hart (1961), p 191). It is difficult to identify how a particular

issue such as abortion would stand in relation to this model, for it would depend in turn upon the meanings placed upon 'altruism', 'will', 'approximate' equality and so on. In addition, as Morrison points out, Hart's model is highly disputable and almost wholly negative:

> The basic objection to Hobbes and to Hart is that their model of isolated aggressive human beings is totally ahistorical: nothing can be gained by positing isolated human beings (motivated by self-interest and survival) coming together to form 'social life' and having to relinquish their egoism. Human life is essentially 'social' at the outset (Morrison (1997), p 368, n 26).

Moreover, Morrison explains of Hart:

> The internal view of law is one of a citizen living in a system and understanding what the laws are about ... (Morrison (1997), p 359).

Further, it may be suggested, such a view suggests a degree of autonomous engagement with legal process by citizen which can only be predicated on a vision of *citizen-participant*. Arguably this vision remains unrealised so long as women do not experience equal participation through political, occupational and private life. More directly, the vision squares poorly with the historicized and still present feminine citizen of *The French Lieutenant's Woman* – who must 'hold back' so long as participation is regulated and screened by her male counterpart, and with the 1967 Abortion Law which does not depict her as a citizen engaging with the law, not as law's subject, but as the subject of law's subject. Those unsympathetic with this view will scoff that the Abortion Law fulfils Hart's hypothesis – it is 'internally' intelligible law, regardless of the gender of the citizen-subject. Yet this law perhaps uniquely in relation to a non-deviant citizen of full capacity, denies sovereign control over personal physical integrity.

In contrast with Hart's vision of human nature, the natural law models of Fuller and Finnis model human nature positively, in terms of goods and aspirations. Fuller's *The Morality of Law*, written and revised in the 1960s, responds to the positivist charge that natural law is simply a collapse into emotivism. By structuring his approach, he proposes to develop not natural law *simpliciter*, but *procedural* natural law. Nevertheless the moral vision of natural law is central to his thesis and although he identifies two aspects of morality necessary in the relation of law to social life – the morality of duty and the morality of aspiration – it is with the morality of aspiration that his theory is chiefly concerned.[13] Similarly, Finnis places a high premium upon goods which are especially coherent in terms of human flourishing. Nevertheless, though Finnis attempts to construct a register of 'goods' which are of 'universal' (apparently 'gender-neutral') application, they impinge differently upon the sexes.[14] Soon after the publication of *The*

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13 See discussion in Simmonds (1986), especially pp 118–24.

14 Barnett ((1998), p 93):

> Natural law has not lost its power: natural law underpins the law relating to human rights, with its insistence on fundamental rights which inhere in individuals, and resonate through the fundamental principles of international law. Where natural law reveals its limitations, from the perspective of women, its in its failure to articulate clearly the right to freedom from discrimination of the basis of gender, race and class. To proclaim the fundamental 'rights of man', which challenge State power and demand protection under the rule of law, is little more than rhetoric when the specificities of gender, race and class inequalities are brought into the debate. For this reason, natural law has attracted little feminist debate ...

French Lieutenant's Woman and *Bruno's Dream*, Judith Jarvis Thomson published an article, 'A defence of abortion' (Thomson (1971)), which attempted to create a 'universal', 'ungendered' ethical model of pregnancy and abortion: a hapless person, of unknown sexual identity who wakes to find a famous violin-player 'plugged in' to his (or her) circulatory system until some alternative life support can be arranged. Finnis replied in an article (Finnis (1973)) which assumes a mostly 'technical' *corrective* stance (itself an interesting rhetorical position) to Thomson's 'misapprehensions' in ethical modelling. Personhood, the key aspect of this exchange, is discussed in the conclusion of this book.

Even when women are clearly located on the 'pro-choice' side of the divide they cannot ignore the deeply troubling result – that to be pro-choice means the prioritisation of the person in being over the person not yet in being, the sacrifice of an unknown potential for an activated potential (Judith Jarvis Thomson's potent ethical model – of the 'famous violin player' 'plugged in' to a donor circulatory system imposes an artefact not present in the actuality of unwanted pregnancy – the 'superior' qualities of the dependent). Nor are there any means of demonstrating the superior claim of either unique and incommensurable life as against the other – indeed most 'natural law' models would characterise any such 'trade-off' as an unacceptable assault upon fundamental deontology. Except that modern natural law developments have foregrounded the first-order importance to each life in being, of freedom to pursue coherent projects giving meaning and expression to that individual life, to the unflinching gaze of the person in being. To 'qualify' this objective in the case of a woman with unwanted pregnancy undermines the entire conception of human flourishing. Indeed to follow through to its logical conclusion it means that a pregnant woman must prioritise the potential flourishing of the foetus over her present active flourishing (or opportunity *to* flourish that life already in being represents). Moreover, if the foetus is a girl, her 'right' to flourish may in turn be trumped by a *potential* flourisher. If the foetus is male, his 'right' to flourish subsists intact. Thus gender becomes the sole determinant of access to a basic human good; from generation to generation, females of the line relegated to a 'second division' where biological determinism is cemented by law.

Such a gloss may be unthinkable, indeed anathema to classical natural law and may remain so for the secularised versions of natural law propounded by modern theorists, an appalling misuse of their ethical models, which for the most part avoid such intimate engagement with the particular from the feminine perspective. Yet applied reflexively in light of the vision of a biologically *undetermined* agent, the gender-free citizen of this abstract world *and* the unwanted child – issue of a (usually) 'willed' act by *two* such agents, cannot be designated to the ethically primitive realm of biology and assume continuing ethical coherence. The competing models of man indicated by Lady Wootton and TB Hadden – mentioned at the beginning of this chapter – of wrongdoer in need of treatment and correction versus wrongdoer in need of punishment, invest in concrete but polarised visions of human nature, which reflect not only difficulties in 'knowing' the moral agent, but also in finding a balanced mediation between compassion and control. The conflicts between compassion and control in the vision of the legal subject were clearly implicated in the abortion question, yet remained virtually untheorised though, quite uniquely, such broad questions of social, political and criminal policy implicated the entire community in an issue involving not simply foetal death, but bodily invasion of citizens.

The complex schemata of *The French Lieutenant's Woman* – of the fluidity of history, of epistemological influences on the shaping of the subject, of the links between these issues and considerations of gender, personhood and existential authenticity, culminate in a thesis concerning the tension between notions of gender, sexuality, identity and agency. In his relation to others, particularly the feminine 'Other' and therefore himself, Charles is in danger of abandoning the authentic interrogation of his moral self: 'It was simple: one lived by irony and sentiment, one observed convention' (p 292). Yet he may, however imperfectly, seek to overcome such stasis: 'See him for what he is: a man struggling to overcome history.'[15] The key elements in this struggle are two-fold. The pursuit of an authentic – and moral – self, when all the certainties of ontology have been swept away and, a determination to arrest the instinctive drive to define and locate his identity primarily *through* his identification of woman. Throughout the book, Charles has evaded confronting the empty and endangered ammonite that is himself, instead pouring 'meanings' into what he perceives to be the empty shell of woman.[16] Every masculine fear and prejudice, myth and theory is advanced – that woman is pure, is sacred, a site of absolute virtue, shallow, calculating, hysterical, evil, artificial, irrational; for the most part her gender clearly defines her as someone undeserving of full citizenship, as something less than a person. As the book unfolds, it becomes clear that the 'mystery' of woman is simply the correlative of her effacement by culture. By the end of the book, there is a tiny glimpse of the possibility of woman as person first, and of Charles compelled thereby to stand, not upon woman, but beside her, a vision of potential equality still unrealised in the 'permissive' and 'liberating 1960s:

> He sought her eyes for some evidence of her real intentions, and found only a spirit prepared to sacrifice everything but itself – ready to surrender truth, feeling, perhaps even all womanly modesty in order to save its own integrity … a modern existentialist would no doubt substitute 'humanity' or 'authenticity' for (Matthew Arnold's) 'piety'; but he would recognise Arnold's intent … Charles … has at last found an atom of faith in himself, a true uniqueness on which to build … to realize that life, however advantageously Sarah may in some ways seem to fit the role of Sphinx, is not a symbol, is not one riddle and one failure to guess it, is not to inhabit one face alone … but is to be, however inadequately, emptily, hopelessly into the city's iron heart, endured … (p 398).

This vision of potential equality – perhaps more importantly, full 'cognate' personhood – is still unrealised in the 'permissive' and 'liberating' 1960s; the Sarah who feels 'cast on a desert island, imprisoned, condemned and I know not what crime it is for' (p 124) remains, in relation to man the lawyer, the scientist, the doctor, as to Charles 'even then a figure, a dark shadow, his dead sister, (moving) ahead of him lightly…' (p 155). And for

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15 Conradi elaborates (Conradi (1982), p 76):

> … in *The French Lieutenant's Woman* … The Fowlesian search for personal authenticity and fullness occurs within a text insistently and wittily reminding us of its own historically bound inauthenticity and incompleteness … the narrative voice … the protagonist … struggling comparably to perceive himself as one agent within a world of subjectivities. The text is equally caught between the need to authenticate itself and the need to punish and denounce its old obligation towards history …

16 Conradi ((1982), p 70):

> Selective omniscience is governed in part by the anima … But Sarah is a subjectivity wholly unknowable, and … the object of a quest … All characters may be ideally autonomous; but some are more autonomous than others …

Charles, as long as his sister languishes in 'death' – however subtly, a civic death above all else – Charles's personhood is concurrently frozen.

Cast on her desert island, we will meet this dead sister again in the next chapter, located in a text written almost 20 years after *The French Lieutenant's Woman*.[17]

17 Indeed, Fowles here encapsulates an image – and potential meaning – recognisably carried through not just from the writings of Hardy, but from the late 19th century in general. Auerbach ((1996), p 23) speaks of:

> ... the deliberate freakishness of nineties [1890s] imagery ... A rich instance is the alluring conjunction of women and corpses ... The female life-in-death figure may indeed be a metaphor for higher, or at least other, concerns.

THE 1980s – THE EMPTY ISLAND: JM COETZEE'S *FOE*

INTRODUCTION

The space of the social contract

This chapter highlights a key literary text of the 1980s, and links that text to an exploration of some influential jurisprudence of the same decade. Broadly, the chapter has echoes in other texts of disparate purposes and times: as will be seen, the chapter begins, not with a 1980s text, but with an odd, true tale of texts echoing back from modern times to previous centuries. Specifically, the chapter begins with a text apparently far from the 1980s – a State Trial of 1663. What ensues is a kind of 'doppler effect' rippling between the 'facts' and 'fictions' of literary, political and legal theory – an effect which markedly undermines the conventional distinction between fact and fiction. The State Trials, sensationalist pamphlets and biographies link to classical political treatises, novels early and late. Whilst the question of identity – especially gender identity – arises overtly only in the novel of the 1980s, it brings sharp focus to the latency of the issue in *all* the texts. In the latter part of the chapter, this heightened awareness of identities, latent and patent, and especially the fragile line between fact and fiction, assists when considering the claim to disinterested analysis implicit to legal and political theory in general, and the jurisprudence of the 1980s in particular. The frailty of such disinterest becomes more evident when considered specifically (via a section entitled 'Interpretation and linguistics') and generically, in terms of the narrative drives of theory itself ('"Big" theory and messianic need'). In terms of intertextuality, the chapter is clearly complex – with State Trials, pamphlets, novels old and new, political treatises, linguistic theory and jurisprudence interlinked. Yet this very juxtaposition reveals the *intimacy* of texts in the creation of cultural beliefs and identities, an intimacy which alerts theory to its own ethical plane.

The chapter originates with a delightful (and true) research 'detective' story. It begins with a desire to explore a postmodern novel holding an allegorical critique of the notion of the social contract as a central theme. Considering the significance of this novel, written in 1987, one is drawn to re-read the novel to which it directly relates, of 1719. But the form of the critique also leads to another text of 1724 which itself, in one fleeting reference, necessitates a trip to the British Library and an encounter with fragments of a 'real' woman tried in 1663 for bigamy and again tried in 1672, this time on a charge of theft which resulted in her execution. The British Library resources multiply, for the drama of the actual – of this apparently notorious felon – spawned a multiplicity of treatises and sensationalised accounts in which any notional boundary between fact and fiction becomes imperilled. So, intriguingly, the novel of 1987 beats a track to 1724, 1719, 1672 and 1663. For the most part this journey was invited by the clues laid by the 1987 author, the rest is perhaps some concatenation of fortunate incident. The circle drawn by the texts, with their play between fiction and fact, invokes singular reflection upon the

public/private domain, of historical record and the legitimate and illegitimate signatories to the social contract.

The 1987 novel in question is *Foe*, by JM Coetzee. It presents a remarkable challenge to the vision of history – and of man – encapsulated in Defoe's novel of 1719, *Robinson Crusoe*. *Foe* interrogates the appropriation of history, of culture, of superior civic standing – most fundamentally, of the means by which such appropriation occurs – of access to the record. The interrogation takes place through the imposition of a woman on Crusoe's island – the woman hitherto excised from history and from power, from the 'island space' forming the cradle of the social contract. Not only does the woman engage with Crusoe, the creature of the social contract, she corresponds with and appeals to *Foe*, the author of Crusoe's story, of the island story, of the history that begets, as Ballard has reminded us, the notion of the community as 'a voluntary association of enlightened citizens'. The naming of this author, *Foe*, pleads intercession with the literal author of *Robinson Crusoe*. Defoe (who changed his name from Daniel Foe) was a seminal contributor to the conception of civic being: in recovering his early name there is play upon the notion of man as a literal 'foe', an enemy to himself and others, withholding from woman access to the pen, to history and to identity.

From *Foe* to *Robinson Crusoe*, we travel to *Roxana*, the novel of 1724, for it seems that the woman washed up on Crusoe's island may derive from this book. Neatly, one Defoe character, excluded from the 'island story', is positioned to meet the occupant of that island. In turning to *Roxana*, we find a text with multiple echoes in the shadowy twists of experience taken by women of the time, twists frequently resulting in appearance on the criminal record. As Backscheider ((1989), p 482) explains:

> Although scarcely new, even petty female thieves were more intriguing than ordinary male footpads, and some of them received as much attention from the press as notorious male murderers. More unusual criminals like Moll King, Sally Salisbury, and Betsy Careless captured London's imagination and convicted females on the scaffold and the carts headed for ships to the colonies were familiar sights. Moll Flanders, of course, resembles the common thieves, but *Roxana* comes closer to Moll King and Sally, both famous whores whose houses entertained men like the duke of Richmond and the earl of Mansfield ... By the time Defoe wrote *Roxana*, Sally Salisbury's story was ... familiar and romanticised ... Her story and Roxana's have several striking similarities ...

Though Backscheider's hypothesis concerning a connection between the fictional character, Roxana, and the real Sally Salisbury may be justified, revisiting the text of Roxana creates another intriguing possibility. It seems likely that we are meant to trace the woman shipwrecked on Crusoe's island to *Roxana*, for she recalls that her name is 'Susan', and Roxana farms out a daughter 'Susan' – the island interrogator may well be aligned with this daughter of Roxana. There is significance to such a construction since Roxana is not only excluded from legitimate power by virtue of her sex, she learns to evade capture through the use of false identities. *Foe* is much concerned with the erasure of identity – through the patronymic system and the elision of feminine history ('herstory') – imposed upon woman. The 'daughter' of such attenuated identity is thus doubly jeopardised, 'daughterhood' simply underscoring the further removal, with every generation, of lineal heritage.

In traversing the various 'aliases' raised by the character Roxana in her elusive twilight existence, a fleeting reference is made to a character notorious in contemporaneous times: 'The German Princess'. Roxana is:

> The Fortunate Mistress, or a History of the Life and vast variety of Fortunes of Mademoiselle de Beleau, Afterwards call'd The Countess of Wintselsheim, in Germany. Being the Person known by the Name of the Lady Roxana in the Time of King Charles II (Defoe (1982 edn)).[1]

In her lifetime, Roxana advances through various liaisons and identities in her bid to maintain freedom of action. Her story is told with a mixture of Puritanism and prurience, a moral tale of descent into corruption, pursuit by her daughter and eventual repentance. Lady, merchant's wife, mistress, whore, mother, stage Amazon, counterfeit Quaker – Roxana embodies the entire gamut of roles available to women in her pursuit of freedom and thereby courts the illicit rather than licit world. Roxana expends much effort evading her daughter Susan. Once only, in the morass of identities offered to the reader, she mentions Susan as one 'of (my) own name' (p 247) – Roxana it seems, if she has any name of her own, is also 'Susan'. When Roxana/Susan seems close to discovering her mother – and the identitification of her own name 'Roxana' with 'whore ('that Roxana was in short a meer Roxana' (p 223)) Roxana confesses 'I might as well have been the German Princess' (p 317). The 'Susan' washed up on Crusoe's island has come to claim an authentic history and identity and the endless counterfeits offered in texts such as *Roxana* – perhaps in texts through the ages, 'legal', 'historical', 'literary' – are challenged. 'The German Princess' seems uncannily adrift in the same waters.

THE TRIAL(S) OF THE GERMAN PRINCESS

The 17th and 18th centuries abounded with stories of foreign heiresses, of kidnaps, women lost, in disguise and with multiple identities. The British Library database relating to 'The German Princess' reflects just such a profile, producing an array of documentation. First, the State Trials of 1663 reveal 'The Trial of Mary Moders alias Stedman, styled The German Princess, at the Old Bailey, for Bigamy'.[2] The accused is said to have carried the names Moders, Stedman, Carleton and possibly Day. The case is chaotic in the extreme: there is a strong suggestion that witnesses have been paid off, allegations are made of the evidence of witnesses curiously absent or untraceable, dubious motivations seem to haunt the courtroom. Fragments of the case read as follows:

> Knot. Yes, I knew her a long time, I was an apprentice seven years near her mother's house in Canterbury.
>
> Court. Then she is no foreign princess? Of what parentage was she?
>
> Knot. I did not know her own father, (aside: and in that he might be believed) but her father in law was a musician there …
>
> William Clerk being sworn, said, My lord, I was last week in Dover, in company with this James Knot and Thomas Stedman; and he the said Stedman did own that he did marry one

1 Original extended title to *Roxana* (all references taken from 1982 edn).
2 15 (1663) Charles II, p 274.

Mary Moders, a daughter of one in Canterbury, and that Knot gave her, and that he had two children by her, and declared his willingness to come up to give evidence against her, but wanted money for his journey: and I have understood that a person here in Court was of a jury at Canterbury, at a trial between Day and Mary Stedman at the bar, for having two husbands.

Court. Was she cleared?

Clerk. I cannot tell …

Court. Where is this man her husband? Hearsays must condemn no man: What do you know of your own knowledge?

Carleton the Elder. I know the man is alive.

Court. Do you know he was married to her?

Carleton. Not I, my lord …[3]

Later, three further witnesses appear, Mr Baley, Elizabeth Collier and Jane Finch. All give evidence of having witnessed various characters being induced to 'view' the accused while she awaited trial, with a promise of money to such characters if they would agree to bear witness against her. Eventually the jury find the accused Not Guilty. The case reports that this finding was accompanied with hissing from the public: on asking that her clothes and jewels be restored to her, Mary Moders is told that the property belongs to her husband.

In this chaotic, somewhat farcical trial with its variously motivated witnesses, it is almost impossible to determine truth from fiction, the reliable from the fraudulent witness. Whether from veracity or design, the voice of the accused appears singularly articulate and compelling:

> Prisoner: May it please your honours, and Gentlemen of the Jury, you have heard the several witnesses, and I think this whole country cannot but plainly see the malice of my husband's father against me; how he causelessly hunts after my life. When his son my husband, came and addressed himself to me, pretending himself a person of honour, and upon first sight pressed me to marriage; I told him, Sir, (said I) I am a stranger, have no acquaintance here, and desire you to desist your suit. I could not speak my mind, but he (having borrowed some threadbare compliments) replied, Madam, your seeming virtues, your amiable person, and noble deportment, render you so excellent, that were I in the least interested in you, I cannot doubt of happiness: and so with many words to the like purpose, courted me. I told him, and indeed could not much wonder, that at so small a glance he could be so presumptuous with a stranger, to hint this to me … And presently afterwards he having intercepted my letter, by which he understood how my affairs stood, and how considerable my means were, he still urged me to marry him: And immediately by the contrivance of his friends, gaping at my fortune, I was hurried to church to be married, which the parson at first did without license, to secure he to my husband, and some time after had a license …[4]

3 *Ibid*, p 276.
4 *Ibid*, p 278.

The case attracted great notoriety, being the 17th century equivalent of a tabloid scandal and stimulating the production of numerous pamphlet 'exclusives' sold on the street. British Library records reveal:[5]

> The Ultimum Vale of John Carleton, of the Middle Temple, London Gent. Being a true description of the passages of that grand impostor, late a pretended Germane Lady (1663).
>
> An Historical Narrative of the German Princess … Wherein also is mentioned sundry private matters, between Mr John Carleton, and others, and the said princess … Together with a story of Billing the Bricklayer … (1663).
>
> The Case of Madam Mary Carleton, lately stiled the German Princess, truly stated: with an historical relation of her birth, education, and fortunes: in an appeal to his illustrious Highness Prince Rupert (1663).
>
> Vercingetorixa or The Germane Princess (Mary Carleton) reduced to an English habit (in verse, 1663).[6]

Within 10 years, Mary had been executed for theft of some plate. New pamphlets ensued:

> Some Luck, Some Wit: being a sonnet upon the merry life and untimely death of Mistress M Carleton (1673).
>
> Memories of the Life of the famous Madam Charlton, commonly stiled the German Princess setting forth the whole series of her actions … from her cradle to the fatal period of her raign at Tilburn etc (1673).
>
> An Elegie on the famous and Renowned Lady, for eloquence and wit, Madam Mary Carleton, otherwise styled, the German Princess (1673).

… and so it goes on, with pamphlets still being produced in 1679, 1732 and 1755. The substance of these pamphlets varies but can roughly be ascribed to two groups: those which purport to be accounts given by, or taken from the immediate parties themselves – Mary the accused on the one hand, or the Carleton contingent on the other (sensationalist enough in themselves) and those which simply hypothesise and embroider the story in prose or in verse. Each gives a different account of the life of the accused, each a unique artefact in terms of rhetoric, prejudice and culture. 'Vercingetorixa' by 'FB Gent' records how:

> It was a Princess in Disguise, With am'rous Looks and piercing Eyes
> That lay there secret and most sullen, and lately had escap'd from Cullen:
> As rich as Croesus, and as fair As any well-drest Flanders Mare …
> The Princess down in Trance did fall, And in Teutonick 'gan to yall …
> But I had almost quite forgot Her Pedigree as broad as Scot,
> Long as Cadwallader the Fierce, (That eats more cheese than Barly Mess)
> Or Low-Dutch Hogan call'd Van Rutter, With Breech of Bacon, Face of Butter:

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5 It is difficult to establish with any certainty who the authors of these pamphlets are – the Library records indicate place of publication and date; the names connected with these facts may be authors, pamphleteers signing under other names, or pamphleteer-publishers (see Bibliography – listed as *The 'German Princess' Papers*).

6 Authorship of *Vercingetorixa* is claimed by FB Gent; however it is listed in the British Library Catalogue main heading as 'BF Gent' (!) – possibly therefore a satirical pseudonym with, as will be seen, vicious content.

> Then she in private told young Lord Of great descent in one bare word
> That she was pigged very high, As from the Toe to top of Thigh
> Call'd Vulva from de Vulva born, As from the Oak drops the Acorn … (pp 9–10).

'The Ultimum Vale of John Carleton' purports to be written by the man who had married the accused and recounts how he was 'taken in' by her pleasant manners and claim to an aristocratic European background. It ends with a lengthy warning against the deceit in women, explaining how:

> I found … this Canterbury German; that is … a she Creature like a Spanish Jennet, got by the wind, for she knows nor owns no father, *Cui pater est populus pater est sihi nullus et omnis, Cui Pater est populus non habet illa patrem*. In English a Bastard, or, a German Soul transmigrated into the Body of a Canterbury fiddlers Daughter: or a German Fiddle-stick, play'd upon a Canterbury fiddle or, the Sperm of a Germane Lord mixt with, and evacuated into an Ale-Tub, and drank up by a Canterbury Hostes … (p 4).

The account purporting to be by Mary herself ('The Life and Character of Mrs Mary Moders, alias Mary Carleton – 1732') claims that she was born in Cologne, to a Licentiate and Doctor of Civil Law named Henry Van Wolway, that both her parents died and she was thereafter brought up in a convent as a Ward of the Church:

> The Church as next a-kin to such Estates (and claims the Right and Disposal of the Ward) secured me, and what I had, in their hands, until such time as I should be of Age and understanding to determine of myself and my Fortunes, which they hoped by so early a Matriculation and Induction of me into the Profession of the Religions, to grasp finally into their hands … (p 14).

Learning comprehensive English from a Mrs Mary Hammond and several other languages, she runs away via 'Utrecht, Amsterdam, Rotterdam, the Brill' eventually taking 'shipping for England, the Elyzium of my wishes and Expectation'. Almost immediately accosted as a foreigner, she is imprisoned by the Carletons until forced to complete a ceremony of marriage under duress. The account includes an appendix recounting her 'Tragical Fall at Tyburn' – her execution.

It is not clear whether Mary was a genuine victim of fortune hunters, abducted and forcibly married for her fortune, or herself a fraud from the outset. Certainly, after the first trial, it seems she courts trouble enough, eventually inviting execution. Some of the pamphlet versions of her life suggest that she was an inveterate fraudster, involved in several bigamous marriages for her own gain, sentenced to transportation, returning, somewhat precipitously, to her fate at the gallows. But a doubt lingers: what if she had been genuine at the outset and – though found 'not guilty', stripped of her property, turned to dishonest means to survive? What if the apparent persecution attempted in the first trial continued to hound her? How did she give such an appearance of wit, education and linguistic skill if she were simply, as some accounts would have it, daughter of a Canterbury tradesman, fiddler or chorister? Almost irrecoverable, the 'true' story is perhaps of less importance than the indication of a versatile feminine intellect inviting hostility and for which there would have been no legitimate channel; of an industry derived from variations on the story, betraying as they do a vision of society hostile yet fascinated by the unknown, the foreign, the woman of means; a society in which whether honest or no, woman was curiously absent from her own story. Like Roxana and her daughter, Mary – 'the German Princess' is excluded not only from any claim upon the

nascent social contract, from a place on Crusoe's island, but also from the sovereign territory of herself.

FOE: WOMAN INTERROGATING THE 'ISLAND SPACE'

The exclusion of woman from Crusoe's island, from her history and identity is newly interrogated in the postmodern poetic.[7] In his novel *Foe*, JM Coetzee interpolates the narrative of 'Susan'. *Robinson Crusoe* and *Roxana* uphold the iconographic oppositions posited in the social contract canon; nature versus civitas, masculine right/rite of citizenship versus feminine bestiality. In *Foe* Coetzee's interposition of Susan is not a syllogistic or teleological summation, an insistence that the untold feminine part of the narrative be imposed; it creates a dialectic upon the predicates of civilisation itself and its claim to a social contract. Especially distinguished is the seminal role of the author, or chronicler in propagating and corroborating prejudicial ideological and cultural values as essential truths and the concomitant absences that this entails. The title *Foe* uncovers this power of authorship, as does the 'postmodern' fracturing of the island story and narrative voice.

Foe sets out to demythologise the vision underlying *Robinson Crusoe* in its seminal depiction of man's civilising relation to nature.[8] Here the island is a barren place, a 'great rocky hill with a flat top, with great beds of brown seaweed which gave off a noisome stench and supported swarms of large pale fleas'.[9] Cruso does not cultivate, but builds endless terraces, barren artefacts. The island is not *terra firma*, but floating, rocking, redolent of Swift's Laputa, certainly not the stable medium of civic topography. Cruso is not the hero 'Crusoe'; his teeth are black and decayed, he is unwashed and refuses to record the material details of his story. He does not 'civilise' Friday, but teaches him only the barest nouns with which to subject him. This detail is quite faithful to the original text although not to Crusoe's self-presentation. Watt ((1963), p 69) notes that in *Robinson Crusoe:*

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7 Postmodern literature and theory ranges from visionary radicalism to the blindly unintelligible. The stimulus and opportunities created by postmodern texts should be treated with proper respect and proper caution. Most notably, postmodern readings can lead to the adoption of sweeping generalities undermining of any progressive ethics. As Terry Eagleton warns (Eagleton (1990), pp 386, 409): 'We can never escape law, regimentation, the prison house of the metaphysical; but this does not stop one fantasizing for a moment.' Nevertheless, with regard to the impact of the postmodern on morality, he notes that, whilst for Raymond Williams and Jurgen Habermas:

> ... morality is most importantly conceived as the material, political movement towards the goal of a humane society, and thus as a bridge between present and future about which the struggles of the past have much to instruct us. The postmodernist preoccupation with a plurality of life-styles too often turns its eyes from the quite specific historical conditions which, in certain areas of the globe, now permit of such a plurality, and averts its eyes too from the stringent, often invisible limitations imposed upon any such plurality by our present conditions of life.

Though the historical determinants of sexual inequality may be somewhat glossed in *Foe*, it is in general a conscientious – and powerful – text in tracing the fragmentation of identity resulting from social excision, in terms of race and sex. Overall therefore, it subscribes to the constraints implied by Williams and Habermas despite the expansive nature of the prose. In short, the text presents contemporary society with a timely rebuke rather than wildly retributive demands.

8 For a discussion of this issue, see Coetzee (1988).

9 Christopher Hill (1980) points out that Robinson Crusoe can be read as 'a glorification of West European technology. It is thanks to the tools and commodities which Crusoe salvages from the wreck that he is able not only to survive, but to prosper, drawing on the heritage of centuries of civilisation'.

> ... a functional silence, broken only by an occasional 'No, Friday', or an abject 'Yes, master', is the golden music of Crusoe's *ile joyeuse*. It seems that man's social nature, his need for friendship and understanding is wholly satisfied by the righteous bestowal or grateful receipt of benevolent but not undemanding patronage.

In *Foe*, Rousseau's vision of the transition from nature to citizen is undermined, as is his assumption of the civic mantle. It is too easy to promote a vision of a prepossessing civic cradle from the origins of society when, for the black-toothed Cruso (Defoe/Rousseau?):

> Growing old on his island kingdom with no one to say him nay had so narrowed his horizon – when the horizon all around us was so vast and so majestic! – that he had come to be persuaded he knew all there was to know about the world (*Foe*, p 13).

In Susan's relation to Cruso, Friday and Mr Foe, the author, the interplay of personal and social forces which define her is revealed; her spectrum of responses mirror her position in the hierarchy. Reader identification and delineation of character is resisted through an open narrative creating a synthesis of experience. Most markedly this produces rhetoric locating the simultaneity of cultural repression for both Susan and Friday, woman and slave, in turn indicating the reflexivity of hierarchical expectations. In this Susan may be seen as a cipher for the Rawlsian 'veil of ignorance',[10] for the reader is forced to realise the reversibility of judgment and the frailty of universality, through the 'resistance' of reflexive characterisation. Furthermore, the textual play with the body as sign fractures the usual location of moral critique within the realm of the purely metaphysical and relocates it in the materiality of the body: Susan's relegation of Friday is Cruso's and Foe's relegation of woman. This prevents the text from descending into unequivocal feminist/ethnic polemic; the resort to hierarchy is humanistically understood (though not condoned) as primal: Susan is as likely as Cruso to be seduced by it.[11]

This self-reflexive dialectic is mediated through the semiotics of the body. The tongue, of which Cruso/Defoe/Rousseau implicitly have mastery, has been severed in Friday; Susan's revulsion at this loss mirrors the contempt held for those whom society renders speechless, yet she fails to see reflected too her own wordless absence from the island, the contractual space. Fear of the silenced tongue mirrors the masculine fear of silenced feminine sexuality – both harbour dark interiors threatening the stability, the light of civitas:

> It was no comfort that his mutilation was secret, closed behind his lips (as some other mutilations are hidden by clothing) ... indeed it was the very secretness of his loss that caused me to shrink from him ... (p 24).

The essential images of sexual and civic mutilation are blurred:

> I could not put out of mind the softness of the tongue, its softness and wetness and the fact that it does not live in the light; also how helpless it is before the knife ... (p 85).

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10 By imposing a 'veil of ignorance', John Rawls attempts, in *A Theory of Justice* (1971), to 'screen out' prejudicial factors in the creation of equitable justice for all. For a summary of feminist critiques of this model, see Morrison ((1997), pp 488–94).

11 See Richardson, Janice (1998) for a discussion of such colonisations, especially in relation to the role of theory.

That those excised from society pose the continual threat of its overthrow is indicated by the:

> ... root of the tongue, closed behind those heavy lips like a toad in eternal winter ... (p 57),

yet the right of these other repressed claims to linguistic/political/social sovereignty is expressed in the hope that:

> If I make the air around him thick with words, memories will be reborn in him which died under Cruso's rule, and with them the recognition that to live in silence is to live like the whales, great castles of flesh floating leagues apart one from the other ... (p 59).

The untold history of woman's and Friday's silencing emphasises the foundational brutality of the social contract:

> Did Cruso cut out your tongue while you were insensible? But how did he staunch the bleeding stump? Why did you not choke on your own blood? (p 84),

and the complicity of masculine *institutions* in fragmenting the feminine/ethnic self is indicated by the speculation:

> ... unless your tongue was not cut off but merely split, with a cut as neat as a surgeons, that drew little blood, yet made speech ever afterward impossible (p 84).

This imagery evokes the full conscious deliberation involved in the violence of excision – the *rational* incision by which the institutions of Church and State, Law and language amputate the black, the feminine, from full civic participation. That this may savage autonomy and derogate from the potential integrity of the social contract is clear, for:

> ... at the stroke of a sword or a knife, wholeness and beauty are forever undone ... (p 85).

Excluded from the civic right of speech, the displaced are dehumanised:

> The tongue belongs to the world of play ... lacking members of play, what is there left for beasts to do when they are bored but sleep (p 85)?

But this reflects a corresponding diminution in the vision of the citizen, so that whether he be the father of a novel or of the social contract canon (or for that matter, the jurist or the pamphleteer) it becomes;

> ... the same story, over and over, in version after version, stillborn every time, the story of the island, lifeless from his hand ... (p 151).

That the citizen's mastery is fed by this perfidy is revealed in the voice of Cruso's feverish subconscious calling 'Masa' or 'Massa' – 'Masa' being Portuguese for a kind of food, 'Massa' the Negro slaves' demonstration of subservience. The inextricable historical and conceptual linkage between the subjugation of women and ethnic groups requires the *renovation* of the island story, a *challenge* to the apparent seamlessness of contractarian progress for:

> To tell my story and be silent on Friday's tongue is no better than offering a book for sale with pages in it quietly left empty ... (p 67).

As exemplified by the various colonisations of 'The German Princess' story, the control of speech, through the real or metaphoric excision of the tongue, is mirrored and assisted by

the control of words on the page; by whomsoever holds the pen.[12] That Susan/woman has been desecrated and subjugated by the controller of the pen (and remember this includes the entire cultural record, from historical and legal chronicle to pamphleteer) is clear in her comments to Foe/Defoe who will write her story:

> Return to me the substance I have lost, Mr Foe, that is my entreaty ... (p 51).

The *imposition* of identity through the pen, of a voice not her own, deprives her of self-authentication:

> Now all my life grows to be a story and there is nothing of my own left to me. Nothing is left to me but doubt. I am doubt itself. Who is speaking me (p 133)?

and the inherent conflict in woman's continuing responsibility as she (we) attempts to rectify her own alienation (and that of the social order) through the still dominant patriarchal system is contained in her realisation that:

> It is still in my power to guide and amend. Above all, to withhold. By such means do I still endeavour to be father to my story (p 123).

At best, a woman can only be father to her story. To enter literary and literal history she must subscribe to the pre-existing edifice of masculine semantic and social order; concomitantly her access to feminine creativity, to the maternal order is proscribed. In *Roxana,* Susan-Roxana as embodiment of the subversive feminine urban chaos threatening the social order, rejects her daughter Susan. This rejection is symbolically crucial. Rousseau's transition from nature to civilisation must not be appropriated by this Other; the civil trial in the text of the novel must clearly indicate to the reader-jury that an act of mass denunciation is required: the exclusion of woman from the social contract can be founded upon her tendency to social deviance and her desertion of 'nature'. Man Friday may grudgingly be allowed an arid space on Cruso's island if only through historical utility, woman must be denaturalised in all senses. Benhabib ((1993), p 279) supposes that it is:

> not the misogynist prejudices of early modern moral and political theory alone that lead to women's exclusion (from the social contract) ... it is the very constitution of a sphere of discourse which bans the female from history to the realm of nature ...

The selective population of Cruso's island and Rousseau's appropriation of it in his image of the transition from nature to civitas demonstrates that even nature is a realm with a topography capable of bestowing potential 'qualifying status' to a subject-inhabitant. Woman's banishment is to an anti-realm, with no claim to the qualifying genealogical myth.

In *Foe,* Coetzee resurrects this aspect of the story of *Roxana*. Susan is plagued by a girl claiming to be her daughter, Susan. Here her denial of her daughter is reviewed: exclusion from participation in the social order fragments the relations of those displaced

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12 Conrad ((1987), p 332):

> Reality no longer attaches to things by reason of what they historically were. It is assigned to them by the mensuration and cataloguing of the modern observer ... Thus Defoe himself, as a manufacturer of writings, participates in the mercantile opulence ... Beneath its busy stocktaking is the terror of amnesia and obliteration – Crusoe's traumatic suspicion that he has been eliminated from the world, forgotten by God, condemned to non-existence.

– Susan is not rejecting her daughter: denied the sovereignty of self, she has neither the power to accept or reject:

> Why send a child in an old woman's clothes, a child with a round face and a little O of a mouth and a story of a lost mother? She is more your daughter than she ever was mine … (p 75).

The multiple names and identities assumed by 'Roxana' to implement her deceptions are here the product of the masculine appropriation of power – the denial of the matrilineal is inscribed in the law and the psyche:

> 'If we were to be speaking of names in truth' say I 'my name would not be Barton' … (p 75),

and the daughter Susan's faint reply:

> 'I am speaking of our true names, our veritable names' (p 75),

is a narrativised exhortation that daughters and mothers be allowed to reclaim their sovereignty, their authenticity. That this injury is created by an excision performed at source rather than experienced as a removal is clear: reconstitution remains impossible within the psychical domain of patriarchy:

> You are father-born. You have no mother. The pain you feel is the pain of lack, not the pain of loss (p 91).

In pursuing Foe/Defoe, the putative writer of 'herstory', Susan stays at his empty house. A visit from the bailiffs and discussion of the writer's penury is a fragment from the incidental experience of Defoe himself and locates the commitment of the postmodern novel to reinterrogate the relationship between the writer and the written, between historian and historicized, through historiographic metafiction. In the symbolic territory of the novel, the genealogical significance of the term 'bailiff' is resurrected, and the house, the domestic, is another form of island – another aspect of the alleged 'contractual space'. Its position at the margin of the narrative echoes the marginalisation of the private and domestic life of the subject in the topography of the social contract, yet however unacknowledged, it is intrinsic to the contractarian story. Here, the visits of the bailiffs are a reminder of masculine self-delusion in his statement of the transition from nature to civitas, his belief in the male subject's smooth grasp upon self-determination at all periods of his genealogy. In terms of the development of the social order, the intervention of the feudal, the 'reign of the bailiffs' (*Foe*) formed a protracted interregnum between his 'rule' of nature and the inculcation of the social contract. The suppression of this period in the genealogical persona of the male subject is pathological, a necessary denial of the fact of his own past subjugation which might otherwise preclude his natural claim to full capacity as a contracting party. In the domestic, private order, the house may also be seen as symbolic of the self – the house in which the male psyche consciously lays claim to the humane egalitarian principles of the social contract through an unconscious effacement of the feudal logic which must feed such prioritising of the male subject, the food (masa) of the master (massa). Benhabib notes that:

> The sphere of justice from Hobbes through Locke and Kant is regarded as the domain where independent, male heads of households transact with one another, while the domestic-intimate sphere is put beyond the pale of justice and restricted to the reproductive and affective needs of the bourgeois paterfamilias … (Benhabib (1993), p 276).

The impoverishment of a self built upon such duplicity, is reflected in the myopia of his discourse, whether in the positing of a social contract or the proselytising of the novel. It is a mutilation of woman and of man himself:

> A tongue not cut off, but split, with a cut as neat as a Surgeon's, that drew little blood, yet made speech ever afterwards impossible ... (*Foe*, p 84).

That we are still engaged in a social and legislative dialectic which attempts to redress the mythologies inscribed within the social contract canon is a 'living' monument to the morbidity of the injury.

Under the more extreme constraints of her time, the character of Roxana discourses upon the 'unsayable' yet invidious position of a woman desiring independence. Though by no means a 'feminist' tract – Defoe was shaped by competing beliefs and mores, not all of them sympathetic to women – *Roxana* is occasionally given rhetorical license regarding the unjust position of women:

> I then did as good as confess, that it was upon the Account of my Money that I refus'd him; and that tho' I cou'd give up my Virtue, and expose myself, yet I wou'd not give up my Money which, tho' it was true, yet was really too gross for me to acknowledge ... so that ... I was oblig'd to give a new Turn to it, and talk upon a kind of an elevated Strain ... that I thought a Woman was a Free Agent, as well as a Man, and was born free, and cou'd she manage herself suitably, might enjoy that Liberty to as much Purpose as the Men do ... (*Roxana* (1982 edn), p 186),

and inwardly, Roxana reminds herself, with a wonderful ironic flourish:

> That the very Nature of the Marriage-Contract was, in short, nothing but giving up Liberty, Estate, Authority and every-thing to the Man, and the Woman was indeed a meer Woman ever after, that is to say a Slave ... especially if the Husband acted as became him ... (Women) had the Name of Subjection, without the Thing ... (*Roxana* (1982 edn), pp 187–88).

Decrying a contract creating the 'name' of subjection, without the 'thing' encapsulates the parallels with social contract critique common to all those – men and women – 'disenfranchised' yet 'taxed', civic units in theory, civic eunuchs in practice.

In an additional pamphlet of 1663, claiming to be penned by Mary Carleton ('Mary Moders') herself and apparently written after her acquittal, an appeal is made in the first person, to 'His Most Illustrious Highness Prince Rupert, Count Palatine of the Rhine and Duke of Cumberland'.[13] The appeal requests that his Highness consider the laws of England which together render a woman powerless. She suggests that in other countries women perhaps have greater self-determination and fears it presumptuous to request that the Prince open his ears:

> ... to the Complaints of an abused Woman in a case wherein the Laws are altogether silent as in the loudest and clamorous noise of the War ... Your Highness ... pity ... is the only support I have against those miseries I Indure, the most unsupportable because irremediable by the Laws of this Kingdom made against *Femes Covert*. I take not upon me to dispute the equity thereof, but in all submiss obedience do cast myself and my cause at your Highnesses feet ... (*The 'German Princess' Papers, No 3*, p 1).

13 *The 'German Princess' Papers, No 3*.

The appeal is lengthy, articulate and indignant, 'yet have I done nothing dishonourable to your better-believ'd sex' but Mary's subsequent fate suggests that – if indeed her own composition – it had little effect in redressing her claim.

Why then are we drawn to revisit these issues in a novel written in 1987? With this decade emancipation in many forms is soundly underway, certainly in most parts of Europe: materially, 'equality' legislation is in place, culturally, both the 'civic' and 'sexual' contracts have undergone change. In a political philosophy text published within a year of *Foe*, cogent analysis of the relation between the civic and sexual reflects continuing apprehensions; Carole Pateman's *The Sexual Contract* (1988) reviews the genesis of classical social contract theory and charts the unacknowledged political link between 'slave' contracts 'sexual' contracts and 'social' contracts. Pateman suggests:

> If the claim that civil society was an order of universal freedom was to be plausible, women had to be incorporated through contract, the act that, at one and the same time, signifies freedom and constitutes patriarchal right. The perception of women (subordination, sex) and the individual (freedom, gender) as alternatives rather than the two inseparable spheres of civil society, underlies a significant historical shift in feminist argument. The juridical equality and legal reform so central to contract doctrine (and which, contrary to the impression cultivated on all sides, has not yet been completely achieved) is invariably seen today as a matter of women acting like men ... After a century or more of legal reform women are near juridical equality with men and all but a few reminders of coverture have been swept away, but men still enjoy extensive power as a sex (p 227) ... When the repressed story of political genesis is brought to the surface the political landscape can never look the same again. Nature, sex, masculinity and femininity, the private, marriage and prostitution become political problems; so, therefore, does the familiar, patriarchal understanding of work and citizenship ... (Pateman (1988), p 233).

Pateman's survey provides a comprehensive review of social contract history and analysis of how, in many ways, contractarianism facilitated the perpetuation rather than radicalisation of the old.[14] It might be felt that such political analysis is more than equal to the task; exposing the errant pathway, laying bare the subsequent loss and injustice. Yet *Foe* contributes an additional strand to this critique and it is specifically through the postmodern poetic that the contribution is vitalised. 'Postmodernism', a term subject to various colonisations, to misunderstanding and derision, is best retrieved in this context of literary theory. It is the most powerful medium for the political message of *Foe*: the political power of earlier literary forms – fable, parable, allegory, satire – has in postmodernism evolved into a complex ethical challenge with politics Inscribed into the narrative fabric, providing a fresh rhetorical space in ethics.[15] The position is complex:

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14 Pateman ((1988), pp 98–99) writes of Rousseau:

> Rousseau argues that there must be 'a natural base on which to form conventional ties' – the natural base of marriage and the family. Rousseau writes that it is 'by means of the small fatherland which is the family that the heart attaches itself to the large one; ... the good son, the good husband and the good father ... make the good citizen!' ... However, if [woman] does not want to do what is necessary to maintain her husband's conjugal mastery, then civil society is endangered ... All people, Rousseau cries, 'perish from the disorder of women' ...

15 'Postmodernism' in this literary-theoretical sense (as opposed to that usually adopted in political theory) tentatively reinscribes rather than destroys identity, perhaps therefore meeting the concern of black feminist author and scholar, bell hooks, who asks:

> Should we not be suspicious of postmodern critiques of the 'subject' when they surface at a historical moment when many subjugated people feel themselves coming to voice for the first time? (cited in Barnett (1998), p 198).

here the novel form is a site of practical ethics 'modelling' *par excellence*, combined as it is with a challenging political prose. Alongside Pateman's provocative 1988 review of political theory runs the insistent message of Coetzee. The genre has clear technical aspects. Typically 'postmodern' techniques include the displacement of traditionally central figures – so the marginalized and absent woman displaces Crusoe and Defoe. Yet this new 'first person' does not provide a reliable and stable 'replacement' for the erstwhile narrator of omniscience, her stance is fractured and multidimensional. The subject of oppression, she can also be its originator and in her discourse upon Friday's injured tongue – through civic excision – the concomitant injury to her own tongue is unacknowledged, begging a question about the reception of normative process. Every aspect of the tale has political significance and it is only in the space opened up by the development of the postmodern poetic that the symbolic power and *physical* nature of disenfranchisement can be addressed. Pure theory, philosophical or political, connects cause and effect, forwards hypotheses; the poetic *insistently* foregrounds the material location of those theoretical links. It is one thing to say 'women and ethnic minorities share a history of oppression', quite another to describe 'a tongue … with a cut as neat as a Surgeons … (making) speech ever afterwards impossible'. Though the traditions of satire and allegory contain similarly charged material, the contemporary context permits a heightened level of reader consciousness; the return to prose stripped of adornment pointing up the symbolic power of words. The simple text on the tongue concentrates all the ramifications of such oppression – not simply past, but present and future. It identifies the fact that institutionalised oppression is inherently violent and those subject to it must *live* the disability not simply as a civic inconvenience or inequality, but as a physical and defining characteristic of everyday life. Failure to identify herself with this injury locates the more subtle excision practised upon woman and her complicity in the injury to others and to herself. Yet even when such extensive implications for theory have been unpacked, the poetic medium retains a more profound ethical rebuke than can be promoted by theory alone. Pure theorists might respond that this is simply due to the emotive, and therefore unreliable poetic form; arguably, however, it is a restoring, a reconnecting of hitherto disconnected form and substance.

FOE AND THE JURISPRUDENCE OF THE 1980s

Foe is a rebuke to the false foundations upon which the Contractarian and Imperialist visions are built. In the act of recording, history is always distorted. The concerted excision of woman from formal history distorts not only history, but the ability of woman to go back *and forward*. Everyone is in part the product of history, or of the 'versions' of history they inherit – men and women alike are vulnerable to lose and gain fragments of themselves in the induction to history. Though at first blush the calculus of gain would seem to favour the 'male' side, at a deeper level – at the level of false foundations – this is not necessarily so. Woman's rebuke to Foe however must be heard with care. For if *false* foundations are a form of loss, the lack of history is peculiarly vertiginous. At the very least, *Foe* contributes acute focus to historical and feminist critiques of the 'social contract', the 'island vision' canon; the false foundations, aggrandisement, reasoned unreason. But in addition, the exposition of an excised history, an excised record poses a particular

challenge to present theory. Modern scholarship attempts new insights both in revising the old and forging the new. Both 'conventional' and 'feminist' theory acknowledge 'inequality' as a central thrust in reforming old foundations. Yet without an effective history or record, 'redressing' inequalities is only part of the picture; 'rethinking' the possibilities of identity – their scope and shape with no active originating locus, however mis-shaped, to revisit, is a very great loss indeed. Yet the concerns which led to the formation of theory – to the social contract canon, to jurisprudence, to history itself – were essential human concerns. Retracing those concerns to the benefit of all *in the light of excision* takes the tasks of theory beyond the redressing of inequalities to notions of individual identity, collective identity and notions of 'the good'. Whilst Pateman's *The Sexual Contract* anatomises the processes and diversions in the philosophical history of the social contract, especially in its nexus with the 'sexual contract', *Foe* provides an extended ethical meditation upon the less measurable but equally profound *effects* of such diversions. Yet – and this is a footnote to the begetting of all history, its regressions, advances, regroupings – in the same decade as these texts – the 1980s – we see a re-incarnation of the island vision, an Empire no less, in the excursus upon law as institution that is Dworkin's *Law's Empire*: wielding the pen now is a friendly foe of novel subtleties.

Law's Empire (Dworkin (1986)) narrates three possible historical models of political association in the community. Firstly, the *de facto* accident of history and geography:

> Imagine two strangers from nations that despise each other's morals and religion are washed up on a desert island ... Each may need the other and may refrain from killing him for that reason. They may work out some division of labor, and each may hold to the agreement so long as he thinks it is to his advantage to do so ... (p 209).

> I call the second model of community the 'rulebook' model. It supposes that members of a political community accept a general commitment to obey rules established in a certain way that is special to that community ... They have no sense that the rules were negotiated out of common commitment to underlying principles that are themselves a source of further obligation ... (p 210).

> The third model of community is the model of principle ... It insists that people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not just by rules hammered out in political compromise ... In short, each accepts political integrity as a distinct political ideal ... (Dworkin (1986), p 211).

Now these models are interesting for several reasons, not least because they begin by retelling the 'island story'. The first version, an island story of the proto- or pre-social contract, simply combines models erected by the canon – by Hobbes, Locke and Rousseau, but fails to inscribe the likelihood – acknowledged in *Robinson Crusoe* and *Foe* – that one human 'unit' will attempt to dominate the other.[16] Once more, not only the colonial – which reveals ethical failure towards the 'other' – but also the feudal, which reveals the humiliating past subjection of *self*, is neatly glissaded. The image is of two

16 Watt, commenting on *Robinson Crusoe* ((1963), p 64) perceives the racial subjugation intrinsic to the book:

> ... a functional silence, broken only by an occasional 'No, Friday', or an abject 'Yes, master', is the golden music of Crusoe's *ile joyeuse*. It seems that man's social nature, his need for friendship and understanding is wholly satisfied by the righteous bestowal or grateful receipt of benevolent but not undemanding patronage ...

'Crusoes' in a hostile wary truce, a balance of power rarely evidenced in history, poorly reflected in the present and indeed not conceived in terms of 'community' at all. The second model of 'unthinking' but co-operative co-existence forms a bridge to the final, triumphant model of political integrity: together the models form a hierarchy in which the third reigns supreme and it gains its supremacy not necessarily because it is a particularly *plausible* model in itself (though ethically it is clearly the most attractive) but because it *gains plausibility when ranged against the other two*. Indeed the models could just as well approximate to a cross-section of attitudes assumed by a monolithic, reductive and stigmatised image of a *single* political community – from the racial and religious tensions of the 'proletarian' inner city (the 'concrete' island!), the unthinking executive 'sheep' of suburbia, to an intellectually engaged, politically responsive elite. Such demographic stereotyping would be crude and inaccurate, yet reflects tellingly upon Dworkin's vision. All the images approximate *roughly* to models of political communities insofar as did those proposed in classical theory but by the same token the models are selective, emotive and in their juxtaposition the reader is 'herded' towards positive disposition regarding the third model, to the model as final resolution. Such triumph then owes as much to built psychological vulnerability as to theoretical rigour and is designed to lend substance to the development of Dworkin's vision of integrity in *Law's Empire*:

> ... a political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force ... (p 188).

Now political (and legal) integrity is clearly, universally an ideal underpinning the very notions of politics and legality. It is also an ideal – a virtue – of great rhetorical force, but in making it the central feature of his treatise, Dworkin's strategy is weak. The approach betrays a romantic belief that the moral cleansing of politics will occur through the deployment of such rhetoric. Indeed the romanticism reflected in the puritan simplicity deployed through the use of the word 'special' is not simply an aspiration, it is a force portrayed as *already among us*. Thus Dworkin moves from the originating vision of the contractarian canon to the aspiration universally held by democratic political communities (for without integrity, politics is lost) yet offered as the new salvation. Most significantly, the steps broadly endorse the status quo and re-inscribe the 'story' of the social contract and the legal order. The 'island story' of the civic agent with his native adjunct of noble (but as yet unrealised) potential is romanced into 20th century vision, not just of island, but of Empire. As *Foe* warns, it is:

> ... the same story, over and over, in version after version, stillborn every time, the story of the island, lifeless from his hand ... (*Foe*, p 151).

INTERPRETATION AND LINGUISTICS

Linguistically and semantically, the 'interpretative theory' of law in *Law's Empire*, with law eventually 'working itself pure' through 'purified' interpretation, is depicted as the contest between interpretations competing for the most cogent degree of 'fit'. At first glance this foray into literary theories of interpretation is compelling, recognising that interpretative practices have a common material base from which may spring divergent

accounts and ideas. Dworkin's conclusion, however, that existing accounts of this process fail to recognise a failure in objectivity, is misleading. Concurring with critical (including feminist) critiques of inner subjectivity, Dworkin diverges in believing that objectivity can be reclaimed – and that his is the path to claiming it. This is not the same as admitting the need to attempt an *approach* towards objectivity whilst admitting its unattainability – the pragmatist's argument – indeed Dworkin specifically rejects such an explanation (Dworkin (1986), pp 225, 226). This is the claim that 'true' objectivity – as 'integrity' – is attainable through the 'more relentlessly interpretative' law as integrity: all interpretations are equal but some are more equal than others. Yet modern theory, in particular 'deconstructive' linguistic theory, demonstrates the impossibility of such a claim. Objectivity can be an aspiration, an ideal, but not a 'fact' of interpretation, for every act of interpretation courts the erection of binary oppositions which themselves conceal hierarchies of meaning and fluidities of meaning. As Cameron ((1985), pp 84–85) points out in an account now familiar to critical theory (*qua* Derrida):

> The opposition is normally used to make distinctions, to argue that X and Y are polar opposites, X one thing and Y another. The deconstructive critic points out, however, that the logic of the argument is faulty, since actually one cannot define X without invoking Y and vice versa. It is impossible to define things in absolute terms and pin down their meaning, because all meaning is relational and therefore shifting ... Furthermore there is a covert hierarchy between X and Y which the distinction depends on though it does not explicitly say so ...

In the hands of some critical theorists, this view has led to a position asserting the collapse of meaning, provoking general disenchantment with postmodern theory. But this should not detract from the validity of the original observation, or its relevance to law and legal interpretation. And with regard to feminist critique generally, Cameron demonstrates the particular relevance of deconstructive theory to the construction and effacement of women through language. It reflects an insidious and almost involuntary aspect of communication, anthropologically intrinsic to language use. Foe is not to blame, need not be calculating or malicious – indeed Susan's relational and reflexive ambivalence to Friday underscores this – but as he who wields the pen (or the gavel), the 'interpreter' is himself *inscribed* with relational language use, which is another way of saying that he cannot but be subjective. Clearly pertinent to feminist critique because of the general *conceptual* positions raised in *Foe* – of a myopic social contract, of an innately selective history – deconstruction throws some light upon the effaced articulation of the German Princess, who in addition to material obstacles and despite her linguistic excellence, becomes the very epitome of binary negations. Nor can good 'interpretative practice', or pro-active equality policies easily defeat such difficulties. In most cases subject to juristic scrutiny, the innate linguistic hierarchy will occur at a level of sophistication quite distinct from the crudities of the pamphleteers, and the linguistic instability it sustains is the more problematic given that it has driven and shaped linguistic *evolution* as well as linguistic practice. Cameron provides a fascinating account of the anthropological and ideological implications of the process, especially with regard to 'metaphorical gender' (Cameron (1985), p 82) a finding from linguistic anthropology demonstrating that reorientating theory to take account of gender 'inequality' is an overly simplistic approach. Cameron's review is fascinating and worth quoting at length:

Jack Rosenthal reports a 'thought experiment' in which people were presented with the following pairs of words –

knife/fork

Ford/Chevrolet

salt/pepper

vanilla/chocolate

and were asked to say which word of each pair was masculine and which was feminine. Strangely enough, people were able to perform this bizarre task without difficulty. Even more strangely, there was near total agreement on the 'right' classification. *Knife, Ford, pepper and chocolate* were masculine, while *fork, Chevrolet, salt and vanilla* were feminine.

This phenomenon is called 'metaphorical gender', and there are three interesting things to note about it. First, it obviously has nothing to do with the actual gender of the words, since all of them refer to ungendered objects or substances. This seems to indicate that the concepts 'masculine' and 'feminine' are infinitely detached from anything having to do with 'real' sexual difference.

Second, the classification does not seem to obey any single, logical principle. Rosenthal speculates that *pepper* and *chocolate* are classed as masculine because they are stronger flavours than *salt* and *vanilla*, while *Chevrolet* is feminine because of its sound (it's a longer word than *Ford*, has an open vowel at the end, connotes 'Frenchness') and *knife* is masculine because of the association with aggression. But the more pairs one adds, the more different dimensions one has to invoke to explain their classification. This suggests that the concepts 'masculine' and 'feminine' operate conceptually at a highly abstract level, subsuming a number of lower-level contrasts such as 'strong/weak' and 'active/passive'. In other words, we are dealing here with a tightly-woven mesh of metaphorical oppositions.

Third, and perhaps most important of all, the attribution of gender is *relational:* it depends on the contrast between two terms. If someone were asked, 'is salt masculine or feminine', they would be at a loss; the question only makes sense if they are asked to compare salt with pepper. And if the comparison is changed, the gender may change as well. For example, if people are given the pair spoon/fork instead of knife/fork, they will say that *fork* is masculine. If *fork* is feminine in relation to *knife* and masculine in relation to *spoon,* clearly there is nothing inherently masculine or feminine, even at an abstract and nonliteral level, in the word *fork* itself ... (Cameron (1985), pp 82–83).

Cameron's apprehension regarding 'innately' prejudicial practice in linguistic structure and practice seems applicable to Dworkin's vision of law. She speaks of the Harvard linguists with their:

... faithful adherence to the more questionable tenets of linguistic science. They built a vast edifice of mystifying theoretical explanation on the assumption grammar is a 'natural' autonomous system that cultural practices play no part in shaping ... (Cameron (1985), p 96).

Interpretative evaluation which could take full account of this problem, (not merely in relation to gendered, but to other 'oppositions' as well) would approach integrity indeed.[17]

17 Drucilla Cornell's *Transformations* makes the point succinctly: '... iterability of language makes consistency with precedent as exact replication impossible and, therefore, interpretation, change and innovation inevitable' – see discussion in Jackson (1994).

Dworkin sees himself as a mediator forging a new vision of law and community unconstrained by natural law and positivist polarities, with their hesitation to over-theorise 'essence' on the one hand and concern to erect rigorous, critique-resistant 'structure' on the other. Clearly he is little touched by the critique of political theory indicated by refinement of these positions, yet his 'median' position simply 'glissades' the developed theoretical discourse. Both in his vision of community and his vision of interpretative practice, developed to ensure Integrity within the Empire, Dworkin re-inscribes the very traits *Foe* takes to task. Approximating to the gloved and masked handling of nuclear material in controlled conditions, Dworkin's interpretative practitioner is represented as mere 'operative' in a neutral, deductive process. Yet as Simmonds (1987) points out, it is possible to view:

> Dworkin's theory of interpretation (as) hierarchical in its structure, with each interpretation needing to appeal to a more fundamental range of criteria ... (p 471).
>
> The demands of integrity explain why Hercules must have regard to established practices and must not simply 'invent'. Law as integrity explains why the distinction between interpretation and invention matters in this case. Law as integrity therefore provides the criteria of fit for the interpretation of legal practices. There is just one problem: law as integrity is also the substantive interpretation of legal practices that is being offered ... (Simmonds (1987), p 479).

So, Dworkin finds integrity through interpretation and interpretation via integrity, a 'circle' of inward legitimation already found in classical theory and indicated in *Foe*, where licensee is his own licensor. Supported by the mythology of Hercules – the juridical Crusoe, the juristic '*Foe*' – with little recourse to documented history and no recourse to social reality; inner purity *determines* externalities despite the fact, as Simmonds points out, that Dworkin's narrow focus simply reflects:

> ... someone who treats the meaning of a practice as determined by its participants' attitudes ... (p 482).

Practices *will* be 'consistent', 'impartial', have 'integrity' so long as only the inscribers and beneficiaries of the practice write them, read them, interpret them. A real threat lurks in the world 'external' to the described process for, explains Simmonds:

> ... the wider social context may not add to our understanding so much as invalidate it (p 482),

and if representatives as well as representations of that context are excised from the interrogatory 'with a cut as neat as a surgeon's', the 'integrity' or 'impartiality' will remain apparently unimpugned.

Dworkin's account of the road to integrity in this reliable old/new Empire treads a path 'between' the poles of positivist and natural law theories, committed to propounding neither a purely analytical framework for law, nor a framework explicitly clothed with notions of the good. Yet he shares a common tightrope between the abyss of the general and the minefield of the particular. Straining to preserve the vision of law as *self-generating* integrity and legitimacy, Dworkin employs a distant, abstracted and iconographic conception of law and political community. In common with many positivist and natural lawyers, he resists, as far as possible, entering the minefield of the particular, for this would both 'contaminate' theory in terms of its architecture – the

purity of form – and open it to piecemeal assaults. This is a reasonable concern, since falling too far into the minefield of the particular can fragment potential insights drawn from abstraction, subjecting theory to a tiresome exchange of sniping. Yet refraining from effective engagement creates an impasse. Forays into the particular are nevertheless particularly strategic in building *toward* the 'interpretative' conception of law whilst carefully avoiding engagement with the more stringent tests harboured by pressing particularities – by contemporary cases of unresolved tension, by irreconcilable ethical paradox. As already indicated, this tightrope is common to many positivist and natural law theorists, sustaining a delicate interplay between hypothesis and synthesis whilst avoiding the dis-equilibrium of antithesis latent to the vertiginous plaint of specific engagement. Legal theory turns from the experimental 'control' offered by legal science and offers a placebo. Little wonder that many eminent practitioners feel unsure of theory, of its relevance or application.

'BIG' THEORY AND MESSIANIC NEED

Foe may seem an emotive source of critique; worse! it is a work of fiction. Yet its location as fiction is no less reputable than that recourse to myth unacknowledged in theory. Its emotive allegorical form is an expansion of practical ethics modelling in philosophy and jurisprudence. As a springboard to critique, *Foe* indicates the epistemological complexity elided by discrete approaches in conventional theory. The critique of the fact/value split via the foregrounded engagement with the interface *between* fact and value that *is* 'historiographic metafiction' – a melding of reflexive questions regarding 'history', 'writing', 'fact' and 'fiction' – permeates the membrane of theory, usually so resistant to critique except that derived from a sacred epistemic circle.

Dworkin, Hart and Finnis have each in their own ways dominated the jurisprudence of the latter part of the 20th century. In their erection of all-encompassing models of the true architecture of law, each asserts a position as visionary in legal philosophy, offering theoretical accounts of almost Biblical proportions. Indeed the discipline of theory invites such accounts, the creation of newly glossed hypotheses from remnants of the old. Nor would the visionary qualities of these models succeed so dramatically were it not for their capacity to meet a *need* of similarly Biblical proportions; the need for an all-encompassing account of the sources of original and continuing legitimacy. *Intellectually*, such accounts are pleasing because they meet the paradigm of scientific 'method' in law, the extrapolation of formulaic accounts, design theories. As 'Messianic' messages, they may also function at an *affective* level, providing reassurance that, after all, chaos and the contingent world will be kept at bay because there is more design within the *genealogy* of law than hitherto understood, even taking account of adjustments required by various forms of critical theory. We have seen that analyses from *outside* jurisprudence contribute to critique of such all-encompassing theory; Pateman, with her assessment of political theory, especially social contract theory, through a feminist lens, and Cameron's review of links between feminism and linguistic theory. As already indicated, *Foe* is a vehicle for the melding of these questions, presenting, via the literary medium, an additional inquisition of meta-ethical discourse.

Yet within the *jurisprudence* of the 1980s there is a similarly guarded re-appraisal of the historical development of legal thought and its future provenance. Argued with the scholarship of integrity – that is, concentrating upon rigorous and closely traced deductive analysis, the text is *The Decline of Juridical Reason* (Simmonds (1984)) and such careful evocation – whilst not devoid of inductive reasoning – does not lay claim to a Messianic declaration. Indeed, the magnitude of popular scholarly response to Dworkin suggests that, in terms of reception, the *affective* need for prescriptive design may outweigh the intellectual pursuit of authentic enquiry. In contrast, a vision of 'decline' hardly offers the security, the panacea of a 'concept' or 'Empire'. This 'affective' primacy of 'Big' theory may even be explained in evolutionary terms, for:

> The believer in a 'naturalised' epistemology would shift the focus of the problem, from a first- to a third-person perspective. Creatures who depend on induction, he will argue, have a better chance of survival than those who use some rival principle, *however* the world turns out to be. Hence this principle will be favoured by evolution, and will drive out its competitors in the struggle for survival … (Scruton (1994), p 187).

In addition, the inductive lead of 'Big' theory may forge not simply new imaginative space, it may also facilitate affective adjustment to harsh or prosaic realities:

> A measured taste for falsehood may be a decided evolutionary advantage. It may even be one of the factors that enable us to face the truth … (Scruton (1994), p 188).

The distinction between concentrated reliance upon inductive as opposed to deductive reasoning is pertinent here – from the classical visions of political and legal community to modern counterparts. The propounding of all-encompassing theory – of 'Big' theory as many scholars append it – has an epistemological history all its own, reinvigorated particularly by the science and philosophy of the enlightenment period. The uneasy epistemological position of law, sometimes envisioned between science and philosophy, invites both idiosyncratic and innovative extensions of scientific and philosophic method. In invoking such developments, a careful balance must be struck, a balance which is essentially entailed by a consciousness of ethics in scholarship itself:

> Whenever we make a prediction, and whenever we infer a general law from its instances, we make an inductive inference: an inference from the observed to the unobserved. In mathematics and logic we reason deductively, and our inferences are valid just so long as the conclusions cannot be false while the premises are true. Deduction is not without its problems; but it is bound to lead from truth to truth. Induction, however, leads us to conclusions which are not entailed by the premises, conclusions which might be false, when the premises are true … (Scruton (1994), p 183).

LAW NOT NECESSARILY WORKING ITSELF PURE …

The Decline of Juridical Reason makes few such concessions to the insecurities or romantic conceits of intellect. The jurisprudence of the present is positioned in terms of a carefully retraced juridical history, warning that we should:

> … reject a certain picture of jurisprudence as an enquiry of the second order, logically distinct from, and logically prior to, the doctrinal study of law. That picture is actually but one part of a wider set of assumptions that operate to distort our understanding of legal

> and political theory. The assumptions concern the relationship between 'theory' and 'reality' in politics and society. Their effect is to prevent us from grasping the significance of those historical perspectives which are essential to our self-understanding ... (Simmonds (1984), p 11).

It may be suggested (though is not so suggested by Simmonds himself) that this warning against the hermetic tendencies of all-embracing, self-referential theories is relevant to Hart, Dworkin, Finnis. But it may also be referable to feminist approaches to theory, and not in the most obvious way. For though feminist theory itself, like *Foe*, has warned against emulating the self-legitimation of traditional theory – recognising the schism between theory and practice identified by Simmonds – it has tended to focus attention upon the concrete empirical, socio-legal aspects of law, thus risking impoverishment in theory. Investing so much in a present *reality*, feminist theory is just as vulnerable to a failure to grasp 'the significance of those historical perspectives' (which ideally take note of interactions between theory *and* reality) as does conventional theory in its pursuit of universal solutions. Theory and practice are *inseparable:* every vision predicates a view of action, every action predicated upon a vision. Simmonds notes:

> The wide separation between theory and reality rests on a failure to appreciate that social relations are 'permeated with ideas of reality' ... (p 12).

Hence, though feminist (and other forms of critical) theory may sometimes locate itself as utterly alienated from the pursuits and understandings of conventional theory, this too may diverge from constructive engagement. Not only does *all* theory inter-relate with ideas of reality – and with other theories – in ways not immediately apparent. In rejecting an epistemology, critical divergence may also reject a premiss fundamental to theoretical advance generally. Though we may turn away from a vision of Empire, we cannot and should not forget the material reality of the Island, of the need to theorise community and law which first stimulated the social contract canon.[18]

Aligning neither with polarised, nor romanticised visions of law, *The Decline* critiques and charts developments in legal thought crucial to the self-understanding of 'conventional' and 'critical' legal theory. The text locates philosophical, political and economic 'strands' in law. Most cogently, it reconnoitres the troubled relationship between theory and practice, legal theory and legal science and charts the historical processes by which the one became alienated from the other. This separation has resulted not only in impoverished developments in theory, but in such conceptual separation that the ideological implications of *practice* have in turn become less effectively theorised. As the *symbiotic* relationship between legal theory and legal science fails, 'reality' becomes subsumed by theoretical myth.

The Decline then does not adhere to the romanticised vision of law as institution of mystical moral stature; law is not somehow 'prior' to morality:

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18 Bottomley (2000) engages searchingly with these issues – of the intrinsic relevance of theory to practice – and of the need to resist the entrenchment of binary oppositions between theory and practice, in her feminist critique and application of Deleuze; see Bottomley (2000) (especially pp 47–48). Bottomley rightly sees theory and practice ideally engaged as intimates and deplores their separation. As will be seen, Simmonds (1984) engaged in the 1980's with the rather different danger that theory would simply become impoverished and eventually suffocated by the bureaucratisation of practice.

> ... the possible relations that may exist between law and morality are dependent on the form that morality itself takes ... law cannot compel any particular inward attitude, but can only require conduct. By encouraging habits of conduct conducive to the acquisition of a virtuous disposition, the law may have an educative or causal role in producing moral good, but that is all ... (Simmonds (1984), p 38).

Even this statement of the limitations of law's potential influence may be optimistic, since the power of law to encourage habits of conduct conducive to virtue may be severely restricted: for example is it legal mores, or social mores which allow the pornography industry to thrive? In the social context, the rhetoric of free expression is an extremely powerful tactic in diverting debate from possible harms created by pornography. Further, since the latter 'harm' is still characterised as conjectural, while freedom of expression is a hard-won 'democratic' instance of individualist values, existing freedom is likely to 'trump' conjectural harm. Even the respective *rhetorics* – 'freedom' and 'expression' (with their links to individualism, creativity and aesthetics) as against the *possible* harm of the poorly defined consumer product that is 'pornography' carry a power all their own. That rhetorical power has of course been tapped by the legal system in the representation of particular agendas, but the contribution of declining *social* morality seems at least as powerful as any juristic position. Nor are the two necessarily separable, but joint products of a protracted ideological 'moment' of moral ambivalence, apathy, scepticism.

The Decline is particularly instructive in identifying the economic implications of contemporary legal science: deducible only when maintaining intellectual independence from overly idealised or overly politicised images of law. Such implications are beyond the purview of the 'visionary' projections of many legal theorists. Thus while Dworkin for example stands 'within' the existing legal order, burnishing the icons of its Empire, Simmonds is placed 'outside', observing the position of law in relation to broad social structures:

> Doctrinal legal science ... rests on a model of the legal order as delimiting the legitimate spheres of conflicting interests. Distribution is left to the market, while the legal order places a high emphasis on the value of autonomy ... this classical form of legal science is wholly appropriate only to the legal order of a market society ... a society pervaded by relationships of an essentially limited, contractual and often transitory nature ... (p 28).

Moreover:

> ... rights are represented by the doctrinal writer as the consequence of general principles applying equally to everyone. The abstraction of legal science is another feature of the same legitimating function: so far as possible, every relationship is expressed at its most general level. In the realms of legal doctrine there are property owners, right-bearers and promissors, but not little old ladies, capitalists, tinkers and tailors ... (p 29).

This analytical distance, identifying recognised and unrecognised legal actors, echoes the view from 'outside' frequently enunciated in feminist theory.

In examining the relationship between fiction and the law in the decades of the 20th century, most of the chapters in the present text, and indeed much feminist jurisprudence, has been concerned with the public/private divide in law. The texts explored thus far in the present study exemplify the intimacy of links between the public and private words in the inculcation of the legal subject. Both 'worlds' are in truth one and the same, the crucible of moral and psychological identity. In particular, feminist legal scholarship has

taken pains to identify the public/private paradigms by which those poorly acknowledged in law – the tinkers and tailors, the little old ladies – are rendered subliminal. The struggle to create legislation to combat domestic violence effectively is one such example. The traditional view of 'domestic' events as part of a 'private' life in which (predominantly masculine) violence is beyond the reach of law – has only been modified in recent decades and that with limited success. Modern parallels to the German Princess, modern 'Susans' and 'Fridays' – can still be found, or more accurately, 'lost' in black holes of doctrine not unconnected with the public/private divide where, for example, to be without economic power is to be beyond representation, for:

> Classical doctrinal legal science, being founded on a historical conception of justice, was a science of private individual transactions ... (p 120).

Furthermore, conceptual *awareness* of how the public/private divide continues to be shaped is important to re-valuations of liminal and subliminal legal actors. Nor is some perpetuation of the divide *in itself* necessarily harmful to the disempowered. Historically the divide, however later metabolised, was engendered by the emergence of civic power, of 'people' power. Poorly represented in social contract mythologies past and present, this painful birth of civic power, as *Foe* indicates, did not 'evolve' – 'noble savage' to 'noble citizen' – but was wrested from the feudal stranglehold. Recognition of this fact is crucial to understanding the status quo, for:

> The analytical separation between civil society and the state profoundly distinguishes the legal order of post-feudal market society from the mediaeval legal order ... Feudal society collapsed notions of property and public power within the single concept of *dominium*. This was a reflection of basic social and economic facts such as the lack of a developed money economy, and the need to seek the protection of the powerful in a violent society ... (pp 120–23).

Clearly, for women and other subliminal persons, the transition from feudal *dominium,* the release from the dictates of a violent society operated from different perspectives of time and space. Though not an inevitable outcome, it is not surprising that any already established inequalities and sublimations, entrenched within cultural practice, were perpetuated. That the precedent for the impotence of the German Princess, of Susan of Friday, was the proto-citizen himself was a fact easily remythologised, since cultural practice already placed the masculine actor, however humbly, in a more active relation to property and public power. In the post-feudal market society, property was power, property was liberty. Already poorly represented, the subliminal became further arrogated as units *in* the new economy: women, slaves, did not cease to be identified as property. Though to modern eyes not an ethically defensible development, it was then an innately practical one.

> The new freedom presented by property was (and is):
>
> > ... uniquely linked to the possibilities presented by the physical and spatial world. It is through the notion of property as a right over physical things that the bourgeois defence of property can be linked to the value of freedom ... (p 123).

But, adds Simmonds:

> Once exchange value [as opposed to 'use' value] is seen as the hallmark of property, as its vital principle, the general idea of property loses its connection with the system of freedom

> in a physical and spatial world and becomes an undifferentiated notion of wealth or revenue ... (p 125).

In the long run, warns Simmonds, this alteration in the status of property has profound implications for the public/private divide and consequential effects upon the conception of public and private domains in law. Nor are such changes particularly visible, but gradual; centrally in the transfer from property as a means of exercising individual power and freedom, to a means of financing government projects. And because legal theory and legal science have become so separated, developments in legal science – *doctrinal* developments which are *concretions* or points of conflict in such transitions – remain poorly theorised and critiqued. Jurists themselves are thus in danger of becoming less than wholly 'witting' instruments of policy – practitioners in contributing innovative support systems to the transition, theorists in the failure to penetrate the philosophical significance of such new interactions.[19]

In relation to such future development of the public/private divide, Simmonds warns that legal science may come to occupy one of two positions. The option of 'revision' would:

> ... inevitably involve acceptance of the idea that law is an instrument and that doctrinal categories and concepts are of purely instrumental significance ... a 'revised' legal science will accordingly be one in which the role of the legal writer is emasculated ... (p 128).

In contrast, 'resistance':

> ... involves the claim that (patterned) distributive justice should be the concern of public law, while historical justice is the concern of private law ... (p 128).

Howsoever inequalities and subliminal identities may seem poorly represented in this 'private' world of historical justice at present, the preservation of a realm of individual freedom through the 'resistance' model seems preferable to becoming an unidentifiable unit of revision. Indeed, the preservation of such balance is crucial to the vision of justice formulated by Rawls who, Simmonds notes:

> Wishes to leave individuals free to arrange their own transactions 'free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system necessary corrections to preserve background justice are being made' ... (p 129).

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19 In addition, the theory/science split may be less mutable than supposed. Douzinas, Warrington and McVeigh consider the application of Marxist theory to legal structures by Collins. Explaining Collins' thesis that 'In regulating the base the law can facilitate or hinder other social processes, hold back or advance different modes of production which would then affect law in a cumulative rather than circular process' (Douzinas *et al* (1991), p 122). They conclude:

> Collins thus claims to have sidestepped the problem of Marxist legal theory by discovering the law in both poles and giving to causation the shape of a loop. The attempt to save Marxism from determinism while at the same time holding on to both ends of the base-superstructure metaphor cannot succeed. As we have seen repeatedly, bipolarities are too stubborn to allow such easy reconciliations. The source of the dominant ideology from which the customs emerge and in turn form the basis of the legal metanorms, the ruling class, is constituted in the relations of production. Ideology, the key to the reconciliation, can be traced back to the economic base and the class which produces it. The result is a return of the economic reductionism that Collins sought to avoid by another name ...

The preservation of these freedoms are dependent upon their location 'within the framework of the basic structure' which includes:

> ... the political constitution, the legally recognised forms of property, and the organisation of the economy and the nature of the family ... (Rawls, p 47, quoted in Simmonds (1984), p 129).

Rawlsian theory is widely recognised as a significant contribution to legal and political theory, asserting the pre-eminence of a moral rather than utilitarian foundation to justice. Feminist critique of Rawlsian theory – most notably in the work of Benhabib – highlights the difficulty created by Rawls' attempt to achieve neutrality in the perspective of the legislator through the 'veil of ignorance'. A central plank of Benhabib's thesis is that (however well intentioned) Rawls thereby perpetuates the self-mythology of classical theory, a mythology which institutes a misleading vision of autonomy and neutrality:

> The decider must decide from the point of view that ignores his identity ... the problem is that the defensible kernel of the ideas of reciprocity and fairness are thereby identified with the perspective of the disembedded and disembodied generalised other ... we must ask whether the identity of any human self can be defined with reference to its capacity for agency alone ... The conception of selves can be individuated prior to their moral ends is incoherent ... (Benhabib (1993), pp 282–84).

To this we may add an additional difficulty: that the 'basic structure' underpinning individual freedoms may be more problematic than Rawlsian theory suggests. Simmonds' critique indicates that such components of the basic structure as 'property' and 'the economy' are poorly understood in terms of their implications for legal science, though the preservation of their locus to individual freedoms should be paramount.[20] Arguably it should be acknowledged that women increasingly share a common interest in such freedoms, nevertheless transformations of the public/private sphere may have different implications in terms of gender.[21] In particular, how are the subliminal legal

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20 Lacey questions the entire individualist point of origin that this implies (Lacey (1998), pp 55–56):

> ... liberals like Rawls and Dworkin unarguably take the individual and his or her needs and interests as their starting point, and move from there towards inferred needs for collective provision. The ultimate value, reflected in Rawls' priority of liberty and Dworkin's emphasis on individual rights, is that of the life of self-determination ... the direction of argument, then, is from individual to collective; it is the life of the citizen, rather than the ideas of citizenship and a community of persons, which is their focus ... the worry about starting with the individual and moving towards the social is that the social provision which, admittedly, theorists like Rawls and Dworkin justify, is valued only indirectly and contingently ... The link between the individual and his or her community is more intimate, and the notion of public goods, collective values and social provision should be more central to political theory, than theorists like Rawls and Dworkin have acknowledged.

21 Lacey ((1998), p 64):

> Not only have influential liberal and communitarian political theorists ... failed so far to provide us with a sophisticated account of the welfare state, but certain structural features of their accounts actually prevent them from doing so. Liberals' commitment to an under-theorised public/private ideology inevitably blinds them to the ways in which the welfare state's wholesale adoption of the traditional model of the family and labour market as structural bases for the distribution of benefits raises fundamental questions of justice to women. But communitarians are unlikely to fare much better. For although they have the theoretical equipment which would allow them to question the current public/private divide and to see that private injustice will be directly reproduced by a welfare state structured like that of Britain, their myopia when it comes to gender issues means that they would be unlikely to identify that obvious source of injustice in the first place.

actors to be positioned in terms of the tracing of power through new economic paradigms?[22] Feminist theory is troubled by how to 'locate' those women who are defined in terms of labour traced only through a second order position in the economy, especially where that labour is manifested in the economically invisible role of carer. In addition, Rawls' 'basic structure' comprises not only constitutional, property and economic factors but also the rather nebulously conceived 'nature of the family'. What visions of family might this entail? What visions of family would women *wish* it to entail? Is the recourse to family in terms of 'nature' a recognition of evolving family models, or incidental, or a remnant of classical paradigms of the public/private divide? We have seen that in the transition from a feudal to a market economy, women became further 'naturalised' into the conception of property, a locus from which they have barely escaped. Escape from a restrictive locus to conceptions of 'family' given their reproductive role is likely to be more difficult, requiring close examination of how the components of any 'basic structure' are conceived across *both* sides of the gender divide.

Why does *Foe* come to being in 1987? In literary terms, the postmodern poetic has now become a powerful new voice – especially in the hands of Coetzee – in the critique of social ethics. This creates a telling adjunct, and foil, to the misplaced 'renaissance', the complaisant optimism descrying the purifying power of law in the teeth of indicators to the contrary. Many modern day Mary Carletons, modern day 'Susans' and 'Fridays' (and in different cast, the poorer of their male white counterparts) are doubly disenfranchised. First, a combination of social and psychical factors delivers them from social participation (and quite possibly into a world of 'alternative' or attenuated being). Secondly, the prevailing normative values of institutional life – political, economic and legal – permeate the collective consciousness with an overwhelming (yet false, and perhaps unattainable) claim to dispense justice and truth to all, to make justice and truth available to all. And whilst individual subjects cannot be absolved of responsibility for themselves, neither can the institutional creed be absolved of its responsibility – of its contribution to failure, of a role in this 'double' disenfranchisement, of the liberality 'trap'. In this late 20th century period of fractured societies, of fractured beliefs, it is unsurprising that the dying refrain of many legal theorists is a desperate reassertion that theory and doctrine work increasingly in concert, rather than that the one is rapidly cannibalising the other. Yet 'equality' discourse, moving forward with legislation spread over several decades (in relation to race as well as gender) now begins to appear inadequate as a formula for redressing former imbalance; disengaged from the full implications of long term

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22 Barnett discusses this problem in detail. Eg, in relation to Marxist, and broader socialist-feminist critiques, she speaks of (Barnett (1998), pp 139–40):

> … the ambivalence in the meaning of 'production' which lies at the heart of Marxist theory. In the analysis of the emergence of capitalism, the production of goods became separated from the home – thus creating the conceptual divide between the private sphere – the home – and the public sphere of economic relations. By focusing on the economic sphere, now equated with the public sphere, the role of women within the family and their productive and reproductive role becomes separated from Marxist analysis. Far from the family being identified as central to the 'relations of production', the family, and woman's role within the family, is marginalized, as is the significance of gender to the issue of class. By focusing on production of material goods, Marx ignores women's reproductive and nurturing role. Some socialist feminists have attempted to find a solution for this dilemma by focusing on the role of women, both inside and outside of the family … Free labour is antithetical to equality between individuals … and thus recognising not just the social value of [women's] work, but also its economic value, is perceived as an appropriate solution …

exclusion from every civic tool, from the shaping of such tools, from an equal role in discourse. Equality discourse is the voice of reasonableness, it is also a thin panacea, disguising an underlying poverty of material (in terms of equality) and, in terms of authentic identity, philosophical progress. Dispensing a panacea does not necessarily sever discourse, but it may well split and disable the potential for discourse. Ultimately the disability lies in the mouths of all contributors to the debate.[23] Perhaps we must conclude, after all, that Crusoe, Dworkin, Coetzee, all in their different ways (and with varying degrees of success) try to challenge rather than merely delineate the boundaries of the status quo; that though poles apart, they are bound by a desire for genuine enquiry which however cannot transcend their particular subjectivity. It is a warning against any apparently transcendent truth built upon a distinction from historical failure. It is a warning to any voice emerging from the ashes of past oppressions, which are the facts of our human history, perhaps a part of our human condition. In *Foe*, Susan asks 'who is speaking me?' – a question underscored by the colonisations and eventual destruction of the German Princess. Though her relation to property would now undoubtedly be different, though she is now embarked upon her possession of the pen, whether as jurist or interlocutor she, alongside her male counterpart, must try to envision possibilities for community beyond the misconceived and empty myths of island, of Empire, of disembodied self.

23 Indeed, though the politically conscientious position invoked by *Foe* is timely for political, social, juristic and feminist theory, the threat of a new tyranny in political correctness is present for all, especially in the privileged 'truth' of new 'histories', whether of fact or value. Of *Robinson Crusoe*, Andrew Sanders writes (Sanders (1996), p 305):

> Although Crusoe's self-exploratory time on his island, his cultivation of the land and of his soul, and his later imposition of his codes of belief and action on Friday, have frequently been interpreted as a fictional enactment of the processes of European colonization, his story has both a particular and a more universal application. When his island is 'peopled' by Friday and by Friday's father and a Spanish sailor (both of them rescued from the cannibals) Crusoe thinks of himself as a king with 'an undoubted right of dominion', an 'absolute Lord and Law-giver'. As such, however, he establishes a principle which many contemporary Europeans would have regarded as offensively radical: a 'Liberty of Conscience' which tolerates pagan, Protestant, and Catholic alike. It was not a principle that was fully established in contemporary Britain. More significantly, Crusoe's earlier heroism is that of the ordinary human will pitted against an alien environment; as far as he can, he brings his surroundings under his rational and practical control not as a proto-colonist but as a lonely exile …

CHAPTER 7

*IN*CONCLUSION

PART I
EMPTY SIGNIFIERS[1]

INTRODUCTION: HUMAN NATURE; HUMAN NURTURE; PSYCHE

Law, literature and philosophy share many concerns. Throughout the texts studied – literary and jurisprudential – 'human nature' is perhaps the concept posing the greatest degree of resistance to understanding whilst at the same time forming a central plank of every hypothesis concerning the moral life. As elaborations of the more basic practical ethics 'blueprints' found in philosophy and jurisprudence, the novels explored here create opportunities to challenge and extend the possibilities of ethical modelling, especially with regard to perspectives unacknowledged in formal theory. In philosophy and jurisprudence, 'human nature' as a concept is usually 'naturalised' into the more overtly analytic aspects of practical ethics propositions, yet glossed with particular qualities serving the overall purposes of the particular theory being advanced. In one form or another, an additional concept is shared by the three disciplines – that of 'the psyche', but jurisprudence and philosophy have fought shy of paying overt recognition to this mystery, teetering as it does somewhere in the foggy regions between 'mind' and 'brain'[2] and, more dangerously, threatening the claims to a neutral territory built upon 'reason' alone. Legal science has paid scant attention to the mystery of the psyche since, pragmatically, its entire structure is built upon assumptions concerning individual mastery of the psyche. Proper containment of errant aspects of the psyche is effected by the combined efforts of doctrine – *mens rea* for example – and medical expertise. Yet in their turn, both medicine and science rely upon hypotheses concerning the psyche which are co-dependent upon a preconception of 'human nature'. Thus the indeterminate core suffers not only from cultural assumptions but from circular relations, circles and assumptions which have affected the cultural construction of masculine and feminine identity.

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1 The political theorist Ernesto Laclau identifies the opportunity for political metabolisation inherent in certain words and ideas; 'nationalism', for example, can be used as a vehicle for propagandas of all political persuasions (Laclau (1994), 'The politics of the empty signifier'). This chapter considers other phrases and ideas similarly colonised from an apparently value-neutral stance.

2 See Szanto ((2001), pp 21–22) for a discussion of some philosophical and moral implications of neurophysiological modelling of the brain which questions the 'Cartesian' mind/brain duality:

> Dennett … rejects quantum mind-brain explanations in all shapes and forms … Together with many other perplexed seekers of the truth about consciousness, I could never quite come to terms with Dennett's idea of completely abandoning the Cartesian Theatre. David Hume could not do it either, in spite of the fact that he was the first to suggest impressions, ideas, memories and imagination as 'subsystems' to explain consciousness. 'Something, somewhere, somehow, just must unite them to explain awareness,' he struggled with the problem … [Dennett explained] … Hume's trouble was that it did not occur to him that simpletons they might be these small subsystems, they can still 'think' their simpleton thoughts. It is their sum total that gives us the illusion of consciousness …

To be human is to be engaged in the enigma of being, in the linkage between identity, agency, morality, mortality, gender, individual, community. The 'classical' view of man engaged in this linkage is well summarised by Peter Conrad in his location of the poet John Donne (Conrad (1987), p 230):

> He is the poet of the perilous Cartesian adventure: he thinks, as Descartes put it, therefore he is; he is responsible for his own being, rather than deriving it from some source outside himself ... But if he ceases to think, will he cease to be? That is the fear of Cartesian man – of Marlowe's Faustus and Milton's Satan; of Robinson Crusoe on the desert island of his solipsism. It is ironic that Donne's most famous utterance is his denial in a sermon of man's insularity, because in his poetry man is islanded in the solitary confinement of identity. He may share that solitude, as Crusoe does, but the woman he admits to it must be a mute accessory, like Crusoe's Friday, to his will; and beyond their absolute monarchy is a region as meaningless and null as Satan's limbo or Crusoe's ocean ... Because all else is void, it can be preyed upon. The ego must assertively colonise the nothingness. Donne, for whom a mistress's body is 'my America! ... My Empire', lies between Tambourlaine and those later imperial minds, Satan and Crusoe ...

As we have seen, a similar coincidence of issues is raised, from a slightly different, and less transparent perspective, when we reflect upon the tensions in jurisprudence, between positivist and natural conceptions of law, from law as mechanism distilling and purifying the mechanical essences so claiming the near eradication of the human touch, to law as expression and guardian of a higher order of which the human is servant and expression. Behind such models lies the necessity that assumptions about human nature, free-will and the moral life must be made. When it is said of Finnis (Riddall (1991), p 129):

> At the end of the road Professor Finnis's conclusion rests on the existence of God, however remote, and however conceived. If we reject any notion of an entity beyond human existence, we are left on our own to decide whether any such thing as moral obligation exists and, if we think it does, where it comes from ...

– the query seems to be one merely of moral motivation in the absence of God; but this in turn implies countless other questions regarding human nature and nurture. And the form that the query takes implies that the absence is accompanied by apprehension, that it presages an impoverished view of human nature. In addition it reverberates with existential anxiety, for it is not simply a practical question, but a question of being. From Descartes to Donne, Hume to Finnis and beyond, this 'existential' anxiety is latent and in modern texts impinges anew upon classical questions of what it is to be, of identity, 'authentic' life, of the 'real' and the 'ideal'; the origin and role of virtue. The texts selected in this study are likewise concerned with, and unusually sensitive to, this anxiety and confluence of questions once the absence of a divine guiding hand is predicated. Though not always a deliberate theme, the relationship between issues of gender and sexuality and these 'universal' questions of existence can be glimpsed tangentially in all the texts. For some of the texts such connections are rendered central and intrinsic to the universal questions: 'being' is somehow inextricably linked with what might be termed 'inter-personality', and *gendered* inter-personality at that. This is in marked contrast to philosophy and jurisprudence, where inter-personal existence informs 'being' as though gendered relationships (as distinct from overtly 'sexual' relationships) were beyond consideration in the 'philosophy of being'.

HUMAN NATURE

The riddle posed by Riddell in his review of Finnis – 'if we reject [or, we could add, even *question*] any notion of an entity beyond human existence, we are left on our own to decide whether any such thing as moral obligation exists and, if we think it does, where it comes from' – is a key question, perhaps *the* key question dominating not just the jurisprudence of Finnis, but jurisprudence in its entirety. The contrasting viewpoints offered by natural law and positivist theories each in their way reflect this question. But intimately, reflexively tied to the enquiry concerning the origin of the moral life, the origin of moral obligation, is that concerning the meaning(s) we ascribe to 'human nature'. For every hypothesis concerning the origin of the moral life predicates a conception of the key ingredients comprising human nature; conversely, each vision of human nature will participate in the production of a conception of the moral life and of moral obligation.

This book began with a quotation proposing a vision of human nature – of 'homo-sapiens' as 'reformed hunter-killer' – radically divergent from those versions usually proposed in jurisprudential enquiry. From the vision of liberal rationality *shadowing Tess of the d'Urbervilles* and the caselaw relating to her, unmasked as so much obeisance to conventions which fly in the face of human failings, to that concealing the characters of Woolf and the *personae* in *The Viscountess Rhondda's* case from *themselves*; from those *judicial* frailties to the frailties of the accused William Joyce and his uncanny resonances with Greene, Bowen, Rebecca West, Hannah Arendt; from the particularly 'existential' critique of the identity and provenance of the human moral agent of Fowles and Murdoch, and the postmodern critique of *Foe*, to the present-day visions of *Disgrace* and *Super-Cannes* – all contribute 'models' of human nature and the relation of this entity to the moral life. And in 'modelling' these visions around some approximation of lives *in the act of being lived*, rather than lives distilled for qualities which fulfil an already formed expectation, an abstracted *ideal* of already established dominant forms, the approach to the problem of human nature is free to accommodate not only fresh material resources, but fresh perspectives. We are invited to question the relation between the private man and the public man, the connection of that elusive artefact called 'free-will' to the psyche, the *difficulty*, even for a conscientiously 'ethical' agent, of negotiating the filmy filaments of the moral world; scant knowledge of the interplay between 'nature' and 'nurture', the almost entirely *untheorised* – and *unacknowledged* – role of the relation between the sexes. The insights to be gleaned from other disciplines, from those which improve our understanding of the psyche – neurophysiology, genetics, anthropology, psychology – to those which improve our understanding of epistemological structures – linguistics, political theory: all promise to bring new understanding to that creature at the heart of philosophy and jurisprudence, the man of reason, the reasonable woman, man, the predator, the anarchist. If the average citizen rides sometimes on top of the Clapham omnibus, but may spend his leisure time perusing the world from some branch of a notional 'tree' – if, in other words, the divide between the 'civilising' of man and the 'animalism' of man is not so great as we have supposed, but he is '*homo sapiens* … a reformed hunter-killer of depraved appetites … partly rehabilitated … now on parole in the polite suburbs of the city state'; this is not necessarily a damning indictment, or source of despair. It is perhaps a timely reminder that the work of society, the work of law should be open to new orientations. The darkness of this view of man reflects the savagery

reverberating so insistently through the 20th century. 'Savagery' is not elsewhere, it is here, it is us. But alongside this heart of darkness, there is perpetual evidence of the will to good, of the recurrence of virtue.

The marked tendency in jurisprudence has been to construe theory around an impoverished view of human nature. This tendency in all probability derives from what jurisprudes regard as their *purpose,* to propose structural explanations which must seek to justify the parameters of the prescriptive institution. Even when that view is notionally 'factored out' of the theory, it is implicit. The odd reformulation of a Crusoe/captive/civic figure in Dworkin has already been noted. Indeed, such images are latent *across* theory. Hugh Collins (Collins (1982), pp 115–16) speaks of:

> The legal fetishism of liberal political theory ... that law is an essential condition of social order and civilisation. This viewpoint is common to classic thinkers like Hobbes and to recent explanations of the justification of state power such as that suggested by Nozick. These philosophies are loosely based upon a prevalent conception of human nature which emphasizes men's tendency towards selfishness, greed, covetousness, and corruption ...[3]

Turning to the view of human nature predicated by Hart, Morrison notes (Morrison (1997), p 368, n 26):

> The foundational image of Hart's idea of 'human nature' is of the isolated individual, committed to personal survival, having albeit reluctantly to accept some restriction of the unrestrained pursuit of self-interest in order that survival (both individual and social) may be possible. Hart tries to lessen the dramatic harshness of Hobbes's view of human nature, but at no time does he present his theory as having political foundations ... The basic objection to Hobbes and to Hart is that their model of isolated aggressive human beings is totally ahistorical; nothing can be gained by positing isolated human beings ... Human life is inescapably 'social' at the outset ... Whilst we should avoid the opposite error of assuming some 'golden age', the assumptions Hobbes and Hart make are closer to the picture of life in Hobbes's time and the reality of human life in competitive capitalist societies. The assumptions about human nature are certainly not 'truisms' as Hart claims, they are highly disputable.

Morrison's location of Hart within the 'reality of life in competitive capitalist societies' highlights the point elaborated by Ballard: that our social organisation is in a *dynamic* relationship with the cultivable moral aspects of human 'nature'.

In contrast, for Finnis, theory is aspirationally focused upon the higher capabilities of human nature, upon the capacity to cultivate virtue, in the light of a rationality honed for secular consumption, but derived from the divine. His 'anthropological' foundation places emphasis upon the co-operative 'universals' of human existence:

> All human societies show a concern for the value of human life; in all, self-preservation is generally accepted as a proper motive for action, and in none is the killing of other human beings permitted without some fairly definite justification. All human societies regard the procreation of a new human life as in itself a good thing unless there are special

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3 Nevertheless, this critique, offered by Marx, itself relies upon the resurrection of an 'essential', 'real' and 'true' self, who is, by implication, more noble:

> Marx ... believed that the essence of human nature lay in man's quest for freedom for self-expression through labour ... that modern society imposed social conditions which were totally incompatible with man's real nature. The effect of this conflict is that man becomes alienated from his true self ... (Collins (1982), p 116).

> circumstances. No human society fails to restrict sexual activity; in all societies there is some prohibition of incest, some opposition to boundless promiscuity and to rape, some favour for stability and permanence in sexual relations. All human societies display a concern for truth, through education of the young in matters not only practical (eg, avoidance of dangers) but also speculative or theoretical (eg, religion). Human beings, who can survive infancy only by nurture, live in or on the margins of some society which invariably extends beyond the nuclear family, and all societies display a favour for the values of co-operation, of common over individual good, of obligation between individuals, and of justice within groups ... (Finnis (2000), p 83).

Although claiming the authority of anthropology, almost every one of these claims can be challenged; furthermore their presentation promotes a particular *reading* of the claims. 'Killing ... without justification' gives an impression of universal reasonableness with regard to this matter, whereas the range of practices recorded in human groups ancient and modern only square with the claim if an extremely flexible (and not so moral) interpretation is placed upon 'justification'. 'Procreation ... unless special circumstances' organises the claim around a *privileging* of procreation, inscribing it with an apparently universal degree of sanctity. The selective abortion and infanticide of female infants practised on a massive scale in India and China does not accord with the *implicit* notion of 'special circumstances' conveyed. The claims concerning restrictions upon sexual activity, 'opposition to boundless promiscuity and rape' privileges a conservative expectation of 'universal' sexual practices which is again misleading – the anthropologist Pierre Clastres, for example, cites an overwhelmingly casual attitude towards sexual relations amongst the Atchei tribe (Clastres (1998), pp 135–37), a casual attitude to rape (p 139); a pragmatic attitude to abortion (p 96). The connections made by Finnis towards the nurture of infants, 'nuclear' and extended relationships and permanence in sexual relations, form an overall 'picture' of social organisation which very much mirrors Western expectation: how easily does an arrangement whereby males hold privileged 'upper housing' for themselves, to share only with young boys used for sexual gratification, whilst the women and children remain 'downstairs' with the pigs 'reflect' the image conveyed by Finnis?[4] As will be seen, the organisation of human societies around such factors as the nurture of infants, and 'stable' sexual relations varies greatly in form and substance.

Yet his view of human nature is not only predicated upon the existence of an omnipotent being. We may also glimpse his view of 'alternative' non-virtuous human nature in the behaviours he collates when the cultivation of virtue is, in his view, relegated by consequentialist, or even purely consumerist motivations:

> Now individuals and societies do in fact 'solve' these problems for themselves and so make the consequentialist injunctions seem workable. They focus on something which they have already set their hearts on an increase in national wealth by collectivising farming, an end to the war, the detection of those heretics or criminals, re-election as President, an end to that young woman's suffering ... Such requirements as interpersonal impartiality of focus, fidelity to commitments, etc, are brushed aside. Thus the 'calculus' is forced through to provide a determinate solution (the quickest, cheapest way of getting what was first focused upon: hence the forced collectivisation and liquidation of the farmers, the nuclear or fire-storm bombing of the enemy's hostage civilians, the inquisitorial torture of suspects

4 See fn 16.

> or informers, the fraudulent cover-up and obstruction of legal process, the abortion of unborn and 'exposure' of newly-born children …) (Finnis (2000), p 117).

Certainly Finnis here is as ready as Ballard and Coetzee to confront the 'baser' side of human nature. But three aspects of his observations should be noted. First, they are extremely 'marginal' to his main thesis, which focuses upon the cultivation of human goods, drawing upon a predominantly elevated view of humanity. Secondly, and this follows from the first, these 'base' characteristics are thereby located as 'other', in fact the 'other' of belonging to the consequentialist camp. Thirdly, the rhetorical positioning of these base, vice-driven activities reveal something of Finnis's mindset when theorising more generally. Whilst positivist jurisprudes attempt to distil human issues out of the analytic equation as far as possible, natural law theorists will acknowledge their alliance to particularities of human existence whilst still attempting to locate a stance of ultimate impartiality. Yet here we glimpse Finnis ranking genocide, nuclear war, torture, abortion, infanticide together. Perhaps in the greater scheme of things he may be proved right. But such ranking does not necessarily reflect a consciousness of how other ethicists – deontologist as well as consequentialist – would view the issues. Centrally, the radical limitation, or prohibition of access to abortion would for many feminist theorists be a 'totalitarian' abuse of women quite concordant with the politics of those other abuses. We learn as much about how he *models* the failings of human nature, as we do about what those failings might be. And there is here an implicit response to Riddall's concern that without Finnis's God, the source of moral obligation is hard to locate. For Finnis, it cannot be found in man alone.

ANTHROPOLOGY

How might additional disciplinary sources further inform our understanding of human nature? Ballard does not place his narrator in moral judgement of human failings, rather he simply offers possible links to explain the present human condition, links almost entirely absent from mainstream philosophical theory and yet which mirror present discoveries and behaviour-patterns. His central image of man, derived from the nomenclature of anthropology, presents a rationale based not upon oppositions of claims to the 'base' or 'noble', but simple behaviourism. Such objectivity is rare: much social and political theory is linked to an *affective*, historical specificity. For example, Bauman, Morrison reminds us (Morrison (1997), p 303) argues that the Holocaust was 'a rare, yet significant and reliable text of the hidden possibilities of modern society' and, continues Morrison:

> In furtherance of Social Darwinist theories the concept of usefulness to society (ultimately to the state) served as a yardstick in determining human worth … beginning with children, the Nazis encouraged and directed a programme of systematic killing … (p 304).

Indeed horror at this 'exceptional' demonstration of human cruelty led to an 'existential shock' (Morrison (1997), p 312) which reverberated through jurisprudence (a summation which has been explored in Chapter 4). Yet though refined critique of the *particularities* of circumstance leading to the Holocaust is necessary, there is danger in identifying such

atrocities as a rare and modern phenomenon.[5] Recently, we have also seen Rwanda, Argentina, Chatila, Bosnia, Afghanistan: in terms of self-understanding through historical record and unfolding events, we are unusually placed in the *co-ordination* of information through the media – the global network. The anthropologist Jared Diamond not only recounts the violent group 'sorties' by chimpanzees which so mirror violent human behaviour, he also comments upon genocide as a 'behaviour':

> If we are not unique among animals in our own propensity for murder, might our propensities nevertheless be a pathological fruit of modern civilization? Modern writers, disgusted by destruction of 'primitive' societies by 'advanced' societies, tend to idealize the former as noble savages who supposedly are peace-loving, or who commit only isolated murders rather than massacres. Erich Fromm believed the warfare of hunter-gatherer societies to be 'characteristically unbloody' [but] ... When we consider early literate civilisations, written records testify to the frequency of genocide ... Evidently, genocide has been part of our human and prehuman heritage for millions of years ... A much more controversial question is whether technology also makes genocide psychologically easier today, as Konrad Lorenz has argued ... (Diamond (1993), pp 296–97).

Indeed, not only recent studies, but everyday events in the newspapers testify to the behavioural aberrance lying just below the surface, not of identifiably 'evil' people, but just those opportunely placed, or inopportunely reared. Of great significance to the classical vision of human nature and the free-willing agent is the incidence of 'group' activity. Uncontrolled children become the killers of James Bulger. On a more pedestrian note, a BBC documentary, *Five Steps to Tyranny* (December 2000)[6] 'explodes the myth that only truly evil people are ruthless ... each and every one of us is capable of committing terrible acts on fellow human beings ...'.[7] Ballard characterises this, both in the individual and social expression; there is a media culture and 'banality' as well as *frisson* behind the behaviour he describes, all factors mirrored in the empirical studies of pornography and prostitution 'tourists'.

The insights gleaned from anthropology and morally 'located' by Ballard as particularly assisted by late-capitalist 'corporate' society, thus alter our perspective upon human 'nature' (how jurisprudence and law might accommodate such perspectives is a moot point, yet the law's reliance upon outmoded medical and cultural models is worthy of grave rebuke and justifies the adumbration of new focal disciplines). The perspective provided by Coetzee in *Disgrace* gives an additional political and cultural gloss to this perspective. There is no place to hide for Enlightenment man.

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5 There is similarly danger in portraying the Holocaust as 'just another' atrocity: see Gaete (2000).

6 'Five steps to tyranny' (2000) *BBC News Online*, 19 December: www.bbc.co.uk/manchester/features/122000/19/tyranny.shtml (2000) BBC Online, 19 December

7 In one experiment 'psychologists observed the reaction of Manchester United supporters to a jogger apparently writhing in agony on the ground after an accident. When the man wore a United shirt, all the United fans went to his aid. But when the same man wore a Liverpool shirt, his cries for help were ignored'. In another experiment shown in the same programme, subjects were instructed to deliver electric shocks to unseen persons when those unseen failed to answer questions correctly. With each 'wrong' answer, the magnitude of the shock was increased. Unknown to the subjects, the 'shocks' were fictitious, although loudly corroborated by 'screams'. The purpose of the experiment was to 'replicate' the circumstances under which individuals participate, seemingly 'inexplicably', in 'inhuman' activity. The vast majority of subjects were compliant; only rare and exceptional individuals refused to participate in the delivery of ever greater 'shocks'.

THE PSYCHE

When we consider the interface between moral agent and the moral world explored by the remaining novels, it becomes clear that an additional aspect poorly factored in the calculus of human nature is that of the psyche. Glanville Williams' critique of the William Joyce case pillories the flagrant abuse of the rule of law, itself an interesting, if indirect comment upon the individual and 'group' motivations, the 'collective' psyche at work behind the institution of law. The divide between the rule of law and the law of the jungle is sometimes but opaquely veiled by institutional mechanisms. But the picture created by Greene and Bowen, Rebecca West and Hannah Arendt, projects the intimacy of connections between psyche and politics; the conflict inherent to the construction of the moral agent, and the phenomenon of such relatively unproblematic provenance in classical theory – free-will.

Again, it should be recalled that jurisprudence and law *does* take note of 'the psyche' in many ways. From the M'Naghten Rules to considerations of 'capacity', from the free-willing agent to the reasonable man, the formation of an 'intention' to the dissociation of the 'automaton', from the reliance upon expert diagnoses of 'psychoses' in psychiatry (the discipline concerned with the 'ab'normal mind) to diagnoses of psychological disturbance in the 'normal' mind – the law makes tenuous forays into these disciplines to supplement its own primitive and incomplete picture of the human agent and human nature. The selection of which disciplines are 'expert' and 'reliable' has historical and cultural, as well as 'logical' roots. Medicine, and psychiatry in particular, have grown as professions alongside that of law. Yet though the law relies heavily upon the classifications of mental conditions identified by psychiatry, psychiatry itself is an inexact and still very 'young' science, more influenced than most by cultural supposition. Psychology as a discipline, being sometimes associated with the production of diagnoses derived from a combination of personality profiling, sociological theory and social observation is less trusted, although increasingly influential. *Psychoanalytic* theory, apart from that properly adumbrated by psychiatry – Freudian models, for example – has even less, perhaps *no* credibility either in the legal or medical professions. Certainly, psychoanalytic theory suffers from many 'problematic' features. It has undergone rapid and splintered, sometimes hotly and publicly disputed, incarnations. Its status as a 'science', with observations based upon empirical evidence, is flimsy. Its language is often arcane and undisciplined, and sometimes utterly self-absorbed, approaching an art form rather than a diagnostic tool in the traditional sense (this in itself is defended by some theorists as an attempt to challenge the boundary between language and the unconscious usually erected by orthodox discourse). Lastly, some aspects of psychoanalytic theory have become enmeshed with theorising broader structures – the impact of institutions upon individuals, the relation between linguistic theory, political theory, aesthetics, and the psyche. Thus while psychoanalytic theory has proved to be a stimulating influence upon most interdisciplinary work – from literary theory to 'postmodern' critiques of science, it has not made of itself a sufficiently coherent, orthodox or 'legitimate' source of ideas for incorporation by the mainstream legal institution.[8] And whilst critical legal and feminist

8 For a fascinating and balanced discussion of Freud's account of the primal origin and institution of law, see Fitzpatrick (2000).

scholars have paid attention to the possible implications of psychoanalytic theory, their work in turn has suffered from many of the difficulties – and sometimes weaknesses – outlined above. In particular, such theorisation has often been wedded, as a point of *theoretical integrity*, to 'postmodern' orientations which are themselves linguistically obscure, widely colonised and disputed and as a result, 'alienating' – as is much philosophy and jurisprudence – to scholars who regard themselves as having a simple 'workaday' brief. Yet there is no doubt that 'the psyche' is perhaps the last truly unexplored realm of our universe and of the law. And, of the 'disciplines' concerned with the psyche, it is through a broadly 'psychoanalytic' discourse (howsoever one may harbour scepticism towards putative psychoanalytic models) that, from a *practical* standpoint, the complex web of relationships between the formation of an 'integrated' self, a 'socialised' self, a 'moral' self and the 'outer' worlds of social, cultural and moral existence can be hypothesised. As Fidelma Ashe comments (Ashe *et al* (1999), p 95):

> Freud's 'discovery' of the unconscious does not ... necessarily place him in opposition to Enlightenment thought on subjectivity. There is clearly, on the one hand, an Enlightenment streak in Freud's theorizing about the self, reflected in his much quoted *dictum* 'where *id* was there so shall *ego* be'. This suggests that the ego, the self possessing 'I', is concerned to tame irrational desires by enabling the subject to act in accordance with reason. The purpose of psychoanalysis might then be conceived as concurring with Enlightenment ideals, in as much as it seeks to restore supremacy to the ego so that the subject may act rationally. Such an approach reflects a common strand in Western thought that regards humans as possessing a dual nature, where a base side of passions and appetites must be controlled by a higher moral and rational side.
>
> On the other hand, an alternative reading of Freud's work reveals it to be much more radical in its implications, even if Freud himself was not fully aware of them. For thinkers of Enlightenment, the essence of the human self was its ability to reason, to know itself and its world. Two aspects of Freud's theory of the human psyche cast doubt on this essentialist assumption. First, even if the ego can control the impulses of the *id*, Freud suggests that the ego itself is involved in repression and fantasy. Thus, to be rational we must first deceive ourselves. Second, the subject cannot be seen as separate from and in control of its external reality, since Freud argued that historical and social forces constitute a part of the mind, the superego. This suggests that the subject's external reality impacts on its internal mental functioning and its cognition. If this is the case, then how far can individual autonomy be assumed? The relationship between self and society is reformulated in Freud's work such that the two are not clearly separate, but interpenetrate in significant ways. Where liberal theories had argued that the rational self could throw off the shackles of social forces, from a Freudian viewpoint these social forces form an integral part of the self.

Psychoanalytic theory has produced further elaborations of the workings of the unconscious, in particular, important modifications and challenges have been made with regard to the impact and implications of psychoanalytic theory to feminist perspectives. With regard to the potential links between the psyche and the moral life in general, the persistent concerns and implications thrown up by 'realization' of the separation between the material world and the 'non'-material world, with no *guaranteed divine*, mediating force – the anxiety of existence reflected again and again through these novels – are for the moment given at least serious recognition in the models offered by psychoanalysis. The relationship between 'the brain' and 'the mind', though each forms a part of everyday discourse, is not understood. The notional 'boundary' between the study of the

'normal' and the 'abnormal' mind – between psychology and psychiatry – is poorly understood. The relationship between neurophysiology – the physiology of the brain and central nervous system – and psychology, poorly understood. All hold crucial implications for our understanding of human 'nature', 'free-will' and agency, in the realms of moral and legal philosophy. The fictional texts studied in this book place emphasis not only upon the predominance of the human psyche in the trajectory from thought to action, but also the extremely tenuous relationship between that psyche and the 'outer' moral world, the *normative* world. Even elementary linkage between the observations of anthropology and those of the psyche suggests that the individual and group 'selves', the individual of 'inner' life and of 'community' life, most of all the individual as moral agent and his apprehension of moral structures and aspirations as *externalities*, are extremely complex issues with implications for social organisation, penal policy, criminal law and justice, public and private life. To take but brief examples of how conventional models are interrogated in the texts studied, we may recall how the 'self' image as patriot and the 'public' image as traitor seemed oddly discordant in the case of William Joyce. The psychological profiling, and appeal to an image of the 'courts of the upper air' offered by Rebecca West went some way to mitigate and explain this discord. In addition, the texts of Greene and Bowen each in their own ways offered models of putative links between the broader political and moral structures forming and *informing* the motivation of the moral agent. Similarly, the work of Murdoch and Fowles each explored the relationship between the formation and development of the moral self and the relation of that self to broader moral imperatives. Murdoch's model in particular diverges radically from the type of model relied upon by traditional legal science, offering a profile of moral characters of varying potential in terms of moral responsiveness – an interesting alternative to the 'medicalised' exceptions allowed to the usually static moral agent of the law, and to the 'universal' and 'polarised' visions of agency offered by the morality of law in general. But of course the 'inner' and 'outer' existence, the 'real' and the 'ideal' – in particular the mediation and construction of the individual moral agent and the world of normative values – are central issues in philosophy and jurisprudence. Though scientific (or 'meta'-scientific) exploration of the psyche may provide *explanations*, philosophy must continue to temper such explanations with critical and challenging relocations and aspirations for the moral life.

SCIENCE AND PHILOSOPHY, 'NATURE' AND 'NURTURE'

The law's reliance upon established science has not always created the most reliable path to justice. The dangers of relying too heavily upon 'new science' – whether anthropology, or the science(s) of the psyche – as a source of insight into the human condition and moral agency, are already signposted by the moral derelictions perpetrated in the name of science in the 1930s and 1940s. Moral philosophy and jurisprudence must not become impoverished or pushed to the margins by insights gleaned from empirical observation. The relationship between philosophy – the understanding of mankind and the nature of existence through reason – and science, is in constant and kinetic play. At the heart of this relationship is, of course, a fundamental question in the exploration of 'human nature' – the relationship between 'nature' and 'nurture'. The behavioural sciences are constantly

preoccupied with this question and have revealed some interesting material.[9] Genetic science creates a particularly challenging test in theorising the appropriate boundary between moral and scientific models of human nature, of the existence and extent of autonomous agency, of 'free-will', as it becomes increasingly clear that we are as much the creatures of chemical and biological processes as they are ours. Though the concluding paragraphs of Matt Ridley's book *Genome* asserts the existence and pre-eminence of 'free-will', the conclusion seems derived more from faith in the notion as a cultural necessity rather than an observable fact. Admitting:

> We have a paradox. Unless our behaviour is random, then it is determined. If it is determined, then it is not free. And yet we feel, and demonstrably are, free. Charles Darwin described free-will as a delusion caused by our inability to analyse our own motives. Modern Darwinists such as Robert Trivers have even argued that deceiving ourselves about such matters is itself an evolved adaptation. Pinker has called free-will 'an idealisation of human beings that makes the ethics game playable' ... Recall that, when discussing chromosome 10, I described how the stress response consists of genes at the whim of the social environment, not vice versa. If genes can affect behaviour and behaviour can affect genes, then the causality is circular. And in a system of circular feedbacks, hugely unpredictable results can follow from simple deterministic processes ... (Ridley (1999), pp 310–11).

Ridley nevertheless concludes:

> This interaction of genetic and external influences makes my behaviour unpredictable, but not undetermined. In the gap between those words lies freedom ... Freedom lies in expressing your own determinism, not somebody else's. It is not the determinism that makes a difference, but the ownership ... A gene for free will would not be such a paradox because it would locate the source of our behaviour inside us, where others cannot get at it. Of course, there is no single gene, but instead there is something infinitely more uplifting and magnificent: a whole human nature, flexibly preordained in our chromosomes, and idiosyncratic to each of us. Everybody has a unique and different endogenous nature. A self (p 313).

From a lawyer's point of view, from the stance of the jurisprude, this conclusion may sound eerily – perhaps reassuringly – familiar, but it is not completely convincing and certainly gives little assistance in bringing further insight to bear upon our understanding of free-will, the reasonable man, the responsible agent. The development of Ridley's paragraph betrays precisely the same flight into rhetoric and retreat into myth characterising philosophical constructions of human nature. Therefore its greatest significance lies in the implicit admission that, even for a geneticist, understanding of 'human nature' and 'free-will' is conjectural. Though Ridley retreats into the presumptions of classical thought, the move is an ideological rather than empirical

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9 Nevertheless, the 'truths' of science should be treated with caution. In the words of Malik ((2000), p 37):

> There are few things more human than science. To be human is to disturb the universe, to humanise it, to bend it to our will. Only through transcending nature, do we begin to realise ourselves as human beings – as creatures who make our history, rather than simply act it out. There are, therefore, few things more dispiriting than turning science into faith. Faith disempowers humans, snatching from their hands the responsibility for their fate. It sets up limits to human possibilities. Making a faith of science is particularly invidious because it turns the party of reason into the high priests of myth, transmuting an open-ended, quizzical view of the world into a narrow, closed dogma ...

testament. In the uncharted conjectural territory of free-will, pragmatism – the assumption of free-will as a practical necessity fundamental to any discussion of human agency and responsibility – must reign for science, for law, for philosophy.

PART II
THE FEMINIST PERSPECTIVE

Freudian theory contributes not only to understanding of the relationship between the self-seeking ego and the socialised self, responsive to moral and ultimately, legal obligation, it also – albeit contentiously – paves the way for revision of the model of man *as* island. The psyche is formed in relation to *others*, and recognition of the role of 'otherness' is central to modern developments in psychoanalysis. In feminist theory, realisation of the *intimate* as well as broadly *social* role of otherness in the formation of identity and the conduct of daily life has political and cultural as well as psychological significance. That personal relations should be afforded pivotal social attention in the formation of the moral agent is borne out in the texts studied in this book. Beyond its role as a chronicle of private life, the literary text demonstrates the nexus *between* these pivotal 'others' and the moral agent in the private and public domain. A useful metaphor and symbol for such interactions, the psychoanalytic concept of 'otherness' has been widely colonised by most disciplines, including the critical legal field. Yet though perhaps latent to most theories of gender identity and moral agency, discussions of 'otherness' may be impressionistic and poorly theorised; an endlessly elastic term denoting entities beyond the self.[10]

Whilst Freud's basic model of the unconscious forms a fundamental aspect of 20th century understanding of the human mind, many of the hypothetical structures posited by Freud as similarly 'fundamental' and unproblematic have demonstrable elements of bias. Most markedly, this bias is expressed in various theoretical forms which reflect and endorse patriarchal beliefs, assertions of 'natural' masculine strength and health and 'natural' feminine neurosis, typologies perpetuated in all aspects of culture. As Irigaray's work suggests:

> ... psychoanalysis is firstly, unaware of the historical and philosophical determinants of its own discourse. Secondly, psychoanalysis is itself governed by unconscious fantasies which it has not been able to analyse. Thirdly, it is patriarchal; it reflects a social order which does not acknowledge what it owes to the mother (Whitford, introducing Irigaray (1991), p 6),

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10 Nevertheless, the discourse of 'otherness' can serve as a useful shorthand for reinscribing the claims of those effaced. The chapters in this book have explored the phenomenon of which Lacey warns ((1998), p 147):

> The 'Other' simply disappears, subsumed within the logic of identity – a process exemplified by the title of one of Dworkin's recent papers: 'Equality, Democracy and the Constitution: We the People in Court' ... Actual practices of 'community justice' are rather marked by another layer of hierarchies ... they imply the constitution of yet other excluded communities whose powerlessness is significantly increased by the invisibility entailed by inclusive communitarian rhetoric...the greater contextualisation of 'problems' – in particular the tendency to 'judge the whole person' rather than a circumscribed incident, which characterises forms of popular justice found in both socialist and fascist totalitarian political formations – has a distinctly repressive potential in the constitution of the abject identity of excluded Others ...

the critique could be levelled at most disciplines, including law, as some critical legal scholars have noted. Further, though Freudian theory was itself developed and critiqued by Jacques Lacan, who gave especial attention to:

> ... the role of language in the formation of the unconscious and in the acquisition of sexual identity (Whitford, introducing Irigaray (1991)),

aspects which clearly made Irigaray's 'own psychoanalytic readings possible', Irigaray in turn attacked Lacan for his 'ahistoricism' and 'social conservatism'. In short, though Freud provided remarkable advances in understanding the possibilities of the psyche and Lacan, through developments in linguistics added further insights (all of continuing interest in understanding *unacknowledged* aspects of ourselves, whether doctrinist or indoctrinated, judge or judged, writer or written) both Freud *and* Lacan continued the peculiarly masculine world view as 'fact'. From Freud to Lacan to Irigaray are charted movements in a world of ideas concerning the mind and its 'realities', culminating in Irigaray's insistence that the feminine, in the world, and in the psyche, be acknowledged. Irigaray's work on *alternative* readings of epistemological cultures and the psyche is vigorous and challenging, asserting a decisive location in feminist theory, politics and law which orientates towards an 'essentialist' view of the feminine:

> So, no more god(s), no more language (*langue*), no more familiar cultural landscape ... Then what can a social group be founded upon? I know that some men imagine that the great day of the good-for-everyone universal has dawned. But what universal? What new imperialism is hiding behind this? And who pays the price for it? ... The first universal to be established would be that of a legislation valid for both sexes as a basic element in human culture. That does not mean forced sexual choices. But we are living beings, which means sexuate beings, and our identity cannot be constructed without a vertical and horizontal horizon that respects that difference ... in certain areas, we have to struggle for equality of rights so as to bring out differences. At least I did think that. I now think that the path of rational method is a utopia or a delusion ... Why is this strategy of equality inadequate? ... there is still almost no type of work which allows a woman to earn a living like any male citizen without alienating her identity in issues and working conditions which are adapted to men ... All this confusion could be resolved by the recognition that there are different rights for each sex and that equality of social status can only be established when these rights have been codified by the civil powers ... (Whitford, introducing Irigaray (1991), pp 206–07).

Clearly, Irigaray's vision of the psyche *and* her resultant cultural and political theory could have provided a rich source of critique for the present text – juxtaposing the insistent questions raised by the *psychological* aspects of construction in the moral agent alongside the cultural and political contexts, in both literature and law.[11] A law-literature-Irigaray text would be a rich and distinctive project. Indeed, in challenging established linguistic and epistemological boundaries – attempting to create a mode of expression *outside* established prose norms – Irigaray adopts a prose style allied to the poetics of postmodern literature: the correspondence between her poetics as *theory* and Coetzee's poetics as *practice* is remarkable. Her coupling of this challenge to *discursive* practice with the challenge to *political* practice (through a 'sexuate' law and ethics) is a necessary gauntlet thrown to institutional life. But the alignment of psychoanalysis and politics

11 See Aristodemou (2000).

through poetics courts the danger of alienating potential converts, intellectually and stylistically. The call to legislate for sexual *difference* seems almost certainly justified, given the incontestable aspects of our biological selves. But the dangers of essentialism remain, alongside the danger of replacing one zeal with another, in Irigaray's words, a 'new imperialism' – not the imperialism she indicates, a furtherance of masculine perspective, but that of an unrepresentative feminine perspective, unrepresentative for women as well as men.[12] The masculine and feminine orientations of the psyche remain uncharted; questions all the more pregnant for being posed against social experiments in shaping new freedoms, equalities and bonds as yet unvisited.

Thus far, this chapter has considered the shared linkage within the texts between the anxiety of existence and resultant uncertainty in the moral life. It has noted the odd recurrence of the 'retreat' into the feminine, even as such retreat is problematised. It has considered the constructions of personhood and connections to gender, the uncertainties surrounding 'classical' models of human nature and the continuing uncertainties – and possible insights – to be derived from epistemologies suggested by the texts, anthropology and psychoanalysis. Yet there has still been little or no consideration of how 'the feminine' might be located, and the implications of each of these issues for the elusive 'being' that is the feminine. Part of the anxiety of existence in general springs from the removal of cultural 'props' or furniture which until very recently have served to reassure the subjects of Western civilisation of their part in a world of order but, as we have seen, the derivation of identity from this world of order stands upon deceptive and frail foundations. Howsoever men may have been positioned more securely within these foundations, they suffer, and perhaps suffer more, from their rational destabilisation. Women have been differently orientated to the existential real. Dislocation from a built 'real' which so placed them at its margins will impinge differently upon them. It must not be assumed that marginal location *necessarily* puts women at an advantage in renegotiating identity – the 'vertigo' experienced in subsequence may simply be of a different texture. Nevertheless, the *distillations* of the real forced by existential 'emergence' are 'universal' – that is, not tied to sexual identity. The characterisation of ourselves as 'cosmic orphans' facing the pure existential challenge posed by our few certainties – death, and the daily engagements with the contingent world forced upon the individual by the fact of existence – conveys a sense of how we must proceed. The philosophical enquiry begun in classical thought, concerning the meaning of our existence, and the expectations flowing from any such meaning, continues apace and must be understood as a quest of universal, supra-sexual significance. With its capacity to assist our notions of how to *construe* mysteries such as that of human nature, the pursuit of 'the good' – in moral selfhood, in the civic world – philosophical enquiry, in tandem with any insights to

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12 Porter discusses the work of Irigaray in conjunction with that of Drucilla Cornell, concluding (Porter (2000), p 151):

> Cornell's claim that 'We need a vision of equality if we are to protect equivalent rights from degenerating into a new defence of separate but equal' seems like a necessary supplement to Irigaray's proposals ... The advantage of a principle or vision of equivalence would be that it would be able to retain difference as the foundation for law. It would also be able to keep open the legislative boundaries while, at the same time, enabling practical and practicable legislation to take place. Indeed, I would like to suggest that equivalence could act as the universal of mediation that Irigaray has mobilised for. As a principle, it could mediate between equality and difference, opening up the desired space of communication and recognition ...

be gleaned from the fragments of 'empirical' observation in divers disciplines, must be regarded as central to *any* enquiry.

The chapters of this book have explored possible links between the worlds of abstract thought and experience, especially with regard to how, in her, or his collision with the law, the law *constructs* the individual subject in accordance not only with practical reason and practical need, but also with cultural artefacts, cultural supposition. The central factor linking the texts selected for this study is that of existential immanence, and the relative freedom of the texts in their resultant capacity to engage with the interaction of the individual subject with the moral life. Since a focus of this study is to explore *feminine* perspectives, the conjunction of the texts with contemporaneous jurisprudence has focused upon the collision between the feminine subject and juridical constructions of her. Nevertheless, since such constructions have correlative implications for the construction of *masculine* identity and thus for society as a whole, there has been an attempt to make the approach from a broad, tangential perspective. Thus, in Chapter 4, the texts representative of the time lead to a study of a dominant issue – treachery – and a male subject to law. Yet the case, the texts and related texts hold significance for the public/private divide, for male/female relations, for the unspoken aspects of subjecthood, which are nevertheless perhaps the most profoundly *constitutive* aspects of the subject of law. In considering those texts, greater attention *might* have been applied to the 'construction' of feminine characters. It would appear that at conscious and unconscious levels, they are created as occupants of a certain location to the world of disordered values – both 'products' and 'producers' – just as are men themselves, but differently positioned. The spheres of influence into which men and women are reared, so long as cultural identities are constituted through such a polarised notion of gender, only 'permit' certain paths to 'being', each with their own attendant 'disabilities'. And though the focus of this study has been particularly concerned with the philosophical, cultural – and therefore 'legal' – constructions of feminine identity, this has not been pursued with a view to 'unmasking' a 'Machiavellian' deployment of masculine power. Such power is itself very much the product of persuasive – perhaps *almost* inevitable – ideological norms, together with biological actuality and historical contingencies. *Rather*, it is to highlight the opportunity to rethink identity, to reconstitute identity in the light of such new perspectives.

Nevertheless, even while considering this *supra-sexual* process of identity construction, the focus upon the feminist aspects of interactions between the texts of fiction and the texts of law and jurisprudence has revealed the deeply complex and subliminal interplay of factors. Though all loosely 'cultural' – whether in relation to the culture of language, of philosophy, of jurisprudence, of politics, of religion, of law, of domestic or social relations – those factors interact with one another and, most significantly, with the lacunae in our understanding and relation to the material world. So 'culture' supplements our uncertainties with reassuring certainties. The operation of this interaction between the known and the unknown has been considered in relation to the theme of 'human nature' – a theme implicit to all the texts in fiction and law. That the term is a vehicle for the perpetuation of gender imprinting is no less true for the feminine as for the masculine. Man is no longer so certain in his orientation to nobility and rationality; concomitantly woman cannot be maintained in the locus of the irrational and ignoble. But what is left? Our century-wide study of these fictional and juristic texts

provides touchstones to the process by which old ideological constructions have been swept away, in tandem with the intellectual, political and epistemological forces shaping and stimulating the ideologies, the fictions and the jurisprudence. Yet for all the attempts made, either in fiction or legal theory, to forge new approaches to critique, fracture weak conceptual artefacts, there has been a tendency, borne of the poverty of language, knowledge, understanding – to return to essentialist perspectives, even when attempting to undermine them. And, as our study of the connotations attached to 'human nature' has shown, this reliance upon essences is nowhere more evident than in the uncertain boundary between nature and nurture, determinism and free-will. Whilst the mysteries of nature and agency may prove resistant to complete explication, in the words of Simone de Beauvoir:

> ... it is for man to establish the reign of liberty in the midst of the world of the given. To gain the supreme victory, it is necessary, for one thing, that by and through their natural differentiation men and women unequivocally affirm their brotherhood ... the reciprocity of their relations will not do away with the miracles – desire, possession, love, dream, adventure – worked by the division of human beings into two separate categories; and the words that move us – giving, conquering, uniting – will not lose their meaning. On the contrary, when we abolish the slavery of half of humanity, together with the whole system of hypocrisy that it implies, then the 'division' of humanity will reveal its genuine significance and the human couple will find its true form. 'The direct, natural, necessary relation of human creatures is the *relation of man to woman*,' Marx has said. 'The nature of this relation determines to what point man himself is to be considered as a *generic being*, as mankind; the relation of man to woman is the most natural relation of human being to human being. By it is shown, therefore, to what point the *natural* behaviour of man has become human or to what point the *human* being has become his *natural* being, to what point his *human nature* has become his *nature*' ...[13]

Though current politics may apprehend new sources for sensitivity in these sentiments – the texts are very much products of their time, and de Beauvoir might not now use the term 'brotherhood' nor Marx refer *exclusively* to male-female relations, the general import of the quotation remains profoundly relevant. Maximisation of our humanity – of our *shared* humanity – is a matter of conduct and conscience: through such exercise of will the possible depredations of 'nature' may be minimised.

The texts selected provide a palatable and intelligible medium through which questions of philosophy and jurisprudence can be situated and understood – vehicles for ethical modelling. Most of the texts, even in the very process of revealing oppressive practices in law and society, seem to hold a hope of future change, of moral evolution. But by the time the literature of the year 2000 is reached, there seems – at least in the form of sober warning – a return to the representation of gender identity as insidious, pervasive expressions of a dark and unavoidable biological determinism. If man is less noble citizen, more *homo sapiens*, woman seems doomed to share the planet in an equally demoralised state. Coetzee's depiction of Lucy accepting rape and the product of rape as a primal fact of male-female relations, Ballard's depiction of executive men 'preying' upon women and children as soon as civic bonds are loosened, reflect a revival of biological determinism in the factoring of human nature which impinge harmfully on men and injuriously on women. Both arise in the context of present developments and

13 Quoted in Frazer, Hornsby and Lovibond ((1993), pp 210 –11).

observations of human behaviour – especially through the novel explosion of documented behavioural observation made possible through printed, audio-visual and information highway exchanges being digested only recently. The present developments in social behaviour these media convey – from the corporate alienation, sex tourism, violence and fact/fiction melding of Ballard, to the rape/race/gender interface of civic disorder, ethnic colonisation and re-colonisation in Coetzee – reflect a realisation of the dominance of materiality, of spiritually impoverished forms of existence. Coetzee in particular makes clear that anyway, past spiritual enlightenment in the form of the romantic and aesthetic cultures of the Occident was itself illusory, always built upon the oppression of some other.[14] To the kinetics of 'otherness' identified by Marx in terms of class and gender, recent critical theory and writing has added the kinetics operating between race and gender.[15] Yet even when account is taken of the probable influence of current politics in facilitating these developments in criticism and ethical theory, the unknown heart of nature and nurture will not go away. When Lucy, in *Disgrace*, says:

> Objectively I am a woman alone. I have no brothers. I have a father, but he is far away and anyhow powerless in the terms that matter here ... Petrus may not be a big man but he is big enough for someone small like me ... then the child becomes his too ... I agree it is humiliating. But perhaps that is a good point to start from again. Perhaps that is what I must learn to accept. To start at ground level. With nothing ... no cards, no weapons, no property, no rights, no dignity ... (p 204),

it is an invitation to consider what is left when the frail trappings of civic order are displaced.

Returning to consideration, for conjectural purposes, of the implications of anthropology predicated by Ballard, of genetics, as indicated by current scientific developments, and of the psyche as indicated by the provenance of all the texts considered, how might such insights impinge upon notions of 'human nature', of nature and nurture, of determinism and free-will, when applied to the feminine? Certainly consideration of anthropological findings tends to undermine the picture of 'inherent' or 'natural' social and developmental organisation, although exploitation of women's (and children's) vulnerability seems prevalent.[16]

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14 See Fitzpatrick (1995) for discussion of the kinetics of this illusion in terms of oppression.

15 Williams and Chrisman suggest ((1994), p 17):

> ... discussion of ethnicity is always also by implication a discussion of gender and sexuality. Women, as the biological 'carriers' of the 'race', occupy a primary and complex role in representations of ethnicity, popular and academic, Black and white, and it is women's exercise of their sexuality which is an often unacknowledged major concern underlying such representations. As Nira Yuval-Davis and Floya Anthias remark, the 'control of women and their sexuality is central to national and ethnic processes'. The dynamics of gender and sexuality are, of course, central issues for both post-colonial and colonial discourse theory. If ethnicity is always-also, in some sense, concerned with gender, gender is always-also in some sense concerned with questions of labour and of the state ...

In *Disgrace*, Coetzee brings these interactions to life.

16 Diamond ((1993), p 233):

> The range of cultural practices in New Guinea also eclipses that within equivalent areas elsewhere in the modern world because isolated tribes were able to live out social experiments that others would find utterly unacceptable ... Child rearing practices ranged from extreme permissiveness ... through punishment of misbehavior by rubbing a Baham child's face with stinging nettles, to extreme repression resulting in Kukukuku child suicide. Barua men pursued institutionalised bisexuality by living with the young boys in a large communal homosexual house, while each man had a separate small heterosexual house for his wife and daughters and infant sons. Tudawhes instead had two-story houses in which women, infants, unmarried girls, and pigs lived in the lower story, while men and unmarried boys lived in the upper ... [cont]

Furthermore, Coetzee's patent warning – his depiction of Lucy's predicament – is reflected in the prevalence of ethnic rape in civil wars the world over. Ballard warns that these behaviours co-exist with apparently advanced civic organisation, bringing 'anthropology', as does Diamond, out of the jungle and into the city.[17] Diamond provides extensive anthropological data concerning behaviour patterns between the sexes which bears out not only the predominance of such behaviour patterns, but of cultural elaborations of them:

> Asymmetric adultery laws, tattooing of wives after insemination, virtual imprisonment of women, genital mutilation of women: these behaviors are unique to the human species, defining humanity as much as does invention of the alphabet. More exactly, they are new means to the old evolutionary goal of males' promoting their genes. Some of our other means to this goal are ancient ones shared with many animals, including jealous murder, infanticide, rape, inter-group warfare, and adultery itself. Human male infibulators stitch the vagina closed; some male animals achieve the same result by cementing a female's vagina after copulating with her ... Sociobiological discussions of human sexuality can be seen as seeking to justify men's abuse of women, analogous to the biological justifications advanced for whites' treatment of blacks or Nazis' treatment of Jews. In the critiques that some biologists have directed at socio-biology, two fears recur: that a demonstrated evolutionary basis for a barbaric behavior would seem to justify it; and that a demonstrated genetic basis for the behavior would imply the futility of attempts at change ... In my view, neither fear is warranted. As for the first fear, one can seek to understand how something arose, regardless of whether one considers that something admirable or abominable. Most books analysing the motives of murderers are not written in an effort to justify murder, but instead to understand its causes as a way of preventing it. As for the second fear, we are not mere slaves to our evolved characteristics, not even to our genetically acquired ones ... (Diamond (1993), pp 96–98).

CONCLUSION

The implication is that 'human nature' harbours behaviours which are predatory but capable of modification; nevertheless, insofar as they are predatory, the behaviours tend to reflect the exploitation of power relations as between the sexes. Whilst such fundamental ethical failure is not only largely denied, but actively promoted in cultural

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16 [cont] story accessed by a separate ladder from the ground ... We wouldn't mourn the shrinking cultural diversity of the modern world if it only meant the end of self-mutilation and child suicide. But the societies whose cultural practices have now become dominant were selected just for economic and military success. Those qualities aren't necessarily the ones that foster happiness or promote long-term human survival ...

17 Note, however, that the public/private divide simpliciter does not account for any apparent status quo – Barnett, quoting the anthropologist Rosaldo summarises (Barnett (1998), pp 30–31):

> ... whilst there remains 'much that is compelling in this universalist account', the 'two spheres' model – of the public and the private – 'assumes ... too much about how gender really works' ... Gender inequalities therefore cannot be explained, as earlier anthropologists and social scientists theorised, by either the biological fact of women's role in mothering and nurturing, or in universal theorising about the consequent relegation of women to the private sphere of life. Biological roles must be understood within the context of the social milieu: inequalities are not determined by biology but rather as social and political constructions of women ...

and commercial practice, society cannot lay claim to the status denoted by the word 'civilisation'. Moreover, the 'range' of behaviours exhibited by human societies underscores the difficulties encountered by the law when it tries to mediate the expression of individual and social freedoms. The texts studied have reflected a rough chronology in terms of an unravelling of conventions, conventions in which the law has played an integral part. The difficulty facing philosophy and jurisprudence when faced with ever more tantalising yet incomplete insights into the relation between nature and nurture, is how to create a moral world which places a premium upon the promotion of the 'sapient' aspects of *homo sapiens*, whilst acknowledging the unknown aspects of 'nature'. Nor are the crude suppositions concerning the roles of the sexes and reflected in purely predatory behaviour necessarily borne out by genetics. The relationship is much more complex and co-dependent at a genetic level:

> ... if we are to believe that the placenta is an organ that the father's genes do not trust the mother's genes to make, then the cerebral cortex is an organ that the mother's genes do not trust the father's genes to make ... If we are like mice, we may be walking around with our mothers' thinking and our father's moods (to the extend that thoughts and moods are inherited at all) ... (Ridley (1999), p 215).

Moreover, with regard to gender, the genetic evidence seems to point to the biological determination of gender,[18] yet an entirely 'polarised' picture of sex-linked inheritance is not entirely correct either.[19]

The picture that seems to emerge then is of biologically determined *tendencies*, which may be much more strongly expressed in some individuals than in others; a model which would seem to correlate well with the huge variation in behaviours both within and *between* the sexes. Sexual identities may well be better imagined in terms of a spectrum rather than polarised opposites.[20] Self-evidently, the fact that there is a *tendency* for men to be physically stronger than women has facilitated exploitative practices. This is clearly an aspect of the mind/body as well as male/female nexus which has to be addressed if we are to place emphasis upon the 'earning', rather than assumption, of a 'sapient' civic mantle upon the shoulders of *homo sapiens*. From Hardy, to Woolf, Greene and Bowen, Fowles and Murdoch, Coetzee and Ballard, there is an underlying *remonstration* with the

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18 Ridley ((1999), p 218):

> John ... held up as a proof of social constructed gender roles ... proved the exact opposite: that nature does play a role in gender. The evidence from zoology has always pointed that way: male behaviour is systematically different from female behaviour in most species and the difference has an innate component. The brain is an organ with innate gender. The evidence from the genome, from imprinted genes and genes for sex-linked behaviours, now points to the same conclusion ...

19 Eg, Ridley reports that, for men:

> It is becoming increasingly clear that sexual orientation correlates with birth order. A man with one or more elder brothers is more likely to be gay than a man with no siblings, only younger siblings, or with one or more elder sisters. The birth order effect is so strong that each additional elder brother increases the probability of homosexuality by roughly one-third ... The effect has now been reported in Britain, the Netherlands, Canada and the United States, and in many different samples of people ... (Ridley (1999), p 118).

20 Barnett summarises possible links between theorists in this regard, (Barnett (1998), p 151, n 30) highlighting the central role of Julia Kristeva in positing a challenge to polarised concepts of masculinity and femininity.

conventions we have perpetuated, conventions which have fed the most elemental aspects of 'human nature', the most exploitative, the least nurturing.[21] In particular, being on the receiving end of exploitative practices has not been conducive to the creation of conditions favouring exploration of the potential of the female mind. Yet if, as biological studies suggest, the female brain is different, (although as Gilligan points out, not inferior), this aspect of the feminine is a significant and as yet, untapped resource not only in terms of intellectual and creative potential, but also in terms of a potential to contribute to different ways of *seeing*, of *modelling* the problems posed by different disciplines. Surely the ultimate mark of civilisation – environmental issues aside – is the recognition and protection of *all* human intellectual and creative capacities. And to do so means creating optimum circumstances in which to flourish in terms of both spiritual and physical need, free from fear. Since the psychical and biological limitations latent to the human condition cannot be known – from the perspective of either pole of the gender spectrum (or any locus along its path) – it behoves us to return to those remnants of understanding which persist. Having dealt with some disturbing foundational possibilities in this inconclusive chapter, the next, last chapter attempts to consider remaining aspects of identity. Though conjecture is unavoidable, elemental issues are distilled in an attempt to consider the implications of the bare physical and moral, life and law: existence and normativity.

21 Sinfield suggests ((1989), p 149):

> Of course, if 'savagery' were really the main characteristic of human beings, we would have destroyed ourselves long ago ... The use of violence depends upon the social and economic circumstances in which people find themselves; establishing territory is a tactic in the repertoire of political manoeuvres, not our essential nature. Richard Leakey believes, on the evidence of palaeontology, that 'reciprocal altruism', not violence is the source of the ascendancy of the human species: 'We are human because our ancestors learned to share their food and their skills in an honoured network of obligation.'

Howsoever such a view may be broadly accurate (and that is perhaps open to question) one becomes conscious here of the use of terms such as essential nature and honoured network. Consider, eg, the notion of 'reciprocal' ... pragmatism.

CONCLUSION

NEGOTIATING EMPTINESS

These snapshots over one hundred years of literature and law indicate the interconnectedness of different worlds, of fact and value, individual and community, female and male, private and public, judge and judged, the texts of philosophy and the philosophies of texts. Tangentially, the texts have permitted consideration of issues already identified by feminist theorists as pivotal in the critique of male/female relations, agencies and identities. Somewhere between the worlds of nature and nurture, constructions appear which reflect the tectonic tensions and elisions perpetuated in male-female relations – in differing perceptions of the public and private, of identity, history, economics, social contract. Enmeshed within these broad philosophical and cultural frameworks, are issues regarded as more 'local', more 'social' or 'doctrinal' – provocation, rape, abortion, pornography, even treason. Yet the studies within this text suggest the unseen yet seamless links between the broad and the local, of the assumptions behind theory and practice, behind 'natural' and 'cultivated' aspects of our world. And this seamless linkage flows too into the constructions undertaken in jurisprudence and philosophy; in both deductive and inductive, *a priori* and *a posteriori* reasoning. Simply, the struggle to stand free of the material and contingent, to adjudicate, theorise and assess impartially – to achieve the integrity of disinterested engagement with the world of ideas in any form – is severely hampered. Our location and attachments to the forces which shape and influence us – and these include our physical, material and ideological conditions – inscribe our identities and identify our inscriptions. The disability, and the struggle to float free of it, is exacerbated by two issues largely denied. Firstly, the integral alignment to a view of nature, of nurture, of male, of female, of humanity and existence itself, is inevitably *encrypted* into *every* text, whether of positivist or natural jurisprudence, literary, feminist, scientific. Springing *from* this is the *second locus* of denial, residing in the claim that the realm of impartial judgements and values is attainable. There is insufficient acknowledgement that objectivity is impossible.[1] *Flagging* this state, the tension between intellectual freedom and unfreedom, is an exercise in intellectual humility necessary to intellectual integrity. We are as much the creatures of the worlds of ideas and values as they are our creatures – certainly, much more so than the architectures of theory and doctrine admit.

Consideration of the 'concrete', material manifestations of social and sexual relations and inequalities in this text has been fleeting and tangential. Similarly, the specific theoretical constructions within the schools of jurisprudence are barely touched upon This is because the focus of the book has been to identify the philosophical and cultural

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1 Expressed in terms of the metaphysics of aspiration *towards* moral objectivity desired in jurists and social and legal subjects alike, Murdoch expresses the problem as follows (Murdoch (1999), p 93):

> 'Good is a transcendent reality' means that virtue is the attempt to pierce the veil of selfish consciousness and join the world as it really is. It is an empirical fact about human nature that this attempt cannot be entirely successful.

fabric linking the world of ideas with the 'workaday' world, the perceived divisions between the worlds of fact and value – the conditions of existence and of co-existence which we inhabit. It is hoped that the linkage between the imagined and real worlds – especially the *correspondence* between them and the critique of the 'real' that this creates, has brought life and focus not only to the intimacy of our 'real' and 'imagined' worlds, but also to the scope for occupying new imaginative and ultimately, moral and ethical, space. For example, though we have observed a persistent 'location' of the 'public' and 'private' worlds, and assumptions regarding their 'appropriate' spheres of influence, such location is not inevitable. But it *is* persistent. The possibility of changed perspectives with regard to the public/private split holds not simply economic, political and social implications, but implications for morality, for dignity.

The overwhelming message of these novels, and their resonance with contemporaneous and modern jurisprudential enquiry, is that existing moral philosophical models – both as guides to, and explanations of human nature and the moral self, converge austerely upon the human agent. The title of this book – *Empty Justice*, is echoed in the chapter titles of the book, beginning with the 'empty city' of today and tracking back through the 'empty wood' to the 'empty island' of recent time. This conjunction of 'emptiness' may at first glance seem glib – how easy to append so weighty, so sententious a word to the vagaries of justice from time to time, how politic in the context of the bruised justice documented by 'feminist perspectives'. Quite so. But 'emptiness' is crucial to another, linked theme, that of the 'existential', in particular, how existential questions – the philosophical problem of existence – create a new aspect for the interrogation of justice and law. Without unquestioning reliance upon ideological structures which 'place' us in a 'natural' and fixed state – master or serf, divinely chosen or divine outcast, male or female, 'good' or 'bad' (states upon which the law and society at large have heavily relied and within which individuals have defined themselves and been defined) we face a novel 'emptiness'.[2] This 'existential' emptiness presents both a terrifying vertiginous space and an exhilarating freedom, raising pressing questions about the nature and existence of ethics, of free-will, again, issues crucial to the common territories of law, literature and philosophy. Crudely, the belief systems, large and small, which have placed and defined us through the ages are imperilled and there is more freedom to envision anew the possibilities for existence.

Thus, a major consideration influencing the selection of the novels in this century-wide study of law, literature, identity and the moral life relate to their concern to negotiate the relationship between uncertainty in existence and in the moral life. Loosely,

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2 Eagleton ((1995), pp 18–19) surveying the literary and philosophical landscape of the century, comments:

> If Victorian rationality is now suspect, it is in part because it is thought to be a mere cloak for human interests. It is in the *fin de siècle*, under the gigantic shadow of Friedrich Nietzsche, that postmodernism first germinates, even before modernism proper had got off the ground … For Conrad, and in a different way for Hardy, men and women view reality perspectivally, from the standpoint of their own brooding obsessions … If God exists, then he would figure as the metaperspective which unified all these others; but in fact he does not, which is why cultural relativism thrives. There is now an empty space which he once occupied, in which individuals collide and mutually misperceive … What has replaced the Almighty, in short, is that place of the 'other' which Lacan dubs the unconscious …

As will be seen, this chapter explores the philosophical implications of such positioning of the 'other'.

this might be termed an 'existential' dilemma. As mentioned in the Introduction, the terms 'existential' and 'existentialism' have been used variously; for this discussion we may simply note common 'existential' themes – the anxiety to locate the source of meaning, and of moral agency *absent* God or divinity, how the human agent might negotiate the moral life, what such negotiation tells us about 'human nature', 'good' and 'evil'. In jurisprudence and law generally, 'models' of human nature are raised, either overtly or covertly, to aid this negotiation between the individual, moral values and the community. Such questions underpin all philosophy; in addition this study assimilates issues of gender and sexuality into the confluence of questions.

'Existential' anxiety – anxiety concerning who and what we are, awe at finding ourselves cosmic orphans at interactive play with a contingent world containing beings other than ourselves – is associated most commonly with Jean-Paul Sartre.

Yet though in modern times Sartre may have acted as a great exponent of the existential, the problem, as the word suggests, is produced by the very fact of existence. When in his *Meditations*, Descartes proposed *cogito ergo sum* – 'I think, therefore I am', this did not *only* have implications for the source of rationality but also for the terrifying enigma of *being*, of asserting 'I exist' in the echo-chamber of the Universe. This enigma, the frail assertion of being – subsists through time and space and is reflected throughout philosophical, literary and legal history, and whatever form(s) it takes – religious, deviant, scholar; male, female, artificer, promissor; weak, strong, sick; seer, judge, dictator, clown – collides with dominant mediating forces. That collision may be an expression of atonement, of nihilism, faith, sickness or despair; it may further justice, ape justice, arrest justice, empty justice. It will always involve the deployment of unequal powers.

THE EXISTENTIAL AND THE MORAL LIFE

From Hardy through to Ballard and Coetzee, the indication of 'existential' emptiness in the novels permits fresh perspectives upon the moral life. If the world of the 'real' is one of accident rather than design, of chaos rather than order, of chance, ugliness and mortality with full as much force as beauty and order; where the individual is obscure, his grandeur an illusion, there are implications for any modelling of the moral life, and the life of ethics and law. Yet the institutions and epistemology of law, albeit in part for practical reasons, in part because of age-old foundations in divinity, minimise recognition of this view.

Beginning with Hardy, this existential element can be tracked in all the novels studied. The 19th century was the century that perfected the 'realist' novel genre. Such novels brought to life, for the first time, an entire community fabric, the empathic (as opposed to stylised) and responsive characters within it and a reassuring reproduction, in minute detail, of the material as well as mental furniture surrounding them. As philosophical and theological sceptic, and perhaps in response to the immanence of *fin de siècle* developments, Hardy steps outside this reassuring world. He indicates an indifferent, or even malevolently 'antic' or 'ludic' universe, where divine justice is

uncertain and mortal and cosmic justice both equally unreliable.[3] He also brings the existential 'moment' – when the reassuring benign face of the 'real' falls away – into play at a crucial *moral* moment, when past injustice may be righted, future wrong avoided. It is the moment when Tess confesses her 'impurity':

> The complexion even of external things seemed to suffer transmutation as her announcement progressed. The fire in the grate looked impish – demoniacally funny, as if it did not care in the least about her strait. The fender grinned idly, as if it too did not care. The light from the water-bottle was merely engaged in a chromatic problem. All material objects around announced their irresponsibility with terrible iteration. And yet nothing had changed since the moments when he had been kissing her; or rather, nothing in the substance of things. But the essence of things had changed ... her cheek was flaccid, and her mouth had almost the aspect of a round little hole ... (*Tess*, pp 297, 299).

This replacement of an ordered and compliant world, with one chaotic, mocking or indifferent, an obscene yet more exact 'hyper-reality', can be traced in all the novels; a key aspect of the anxiety of existence. When we move to James Joyce and Virginia Woolf, the very use of modernist prose, the foregrounding of the disordered, prevaricating mind, expresses this immanent chaos. In addition, Woolf's entire approach to the subject/object/reality debate, her observation of the empty room, of the table in the tree, of the self-delusion of the philosopher Mr Ramsay pursuing 'Q', feeling 'as he felt when he had probed something absolute about the digestive system of plants, that barbarity was tamed, the reign of chaos subdued' (*Lighthouse*, p 54); and her asking:

> Did nature supplement what man advanced? Did she complete what he began? With equal complacence she saw his misery, condoned his meanness and acquiesced in his torture. That dream, then, of sharing, completing, finding in solitude on the beach an answer, was but a reflection in a mirror (*Lighthouse*, p 146),

expresses doubt about the power of rationality in the face of such indifference. In the literature of the 1940's, we find Elizabeth Bowen describing war creating 'a thinning of the membrane between the this and the that' (p 194), whilst her character Robert describes 'nothing to hold, nothing to touch. No source of anything in anything'. Graham Greene captures a terrifying void between the myths of the erstwhile 'real' – the value system by which his character has lived, the chivalric identity of *The Little Duke*, and a chaotic, surreal present:

> ... where even the ground whined when he pressed it ... 'There isn't anywhere else at all,',and whenever he tried to move his feet the earth whined back at him: he couldn't move an inch without causing pain ... (*The Ministry*, p 67).

By the 1960s, this existential apprehension is woven seamlessly into the fabric of ideas, in the frail boundary between the physical and mental worlds. In *Bruno's Dream*, death is not treated euphemistically. Even more stark than Kafka's *Metamorphosis*, we see Bruno's body:

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3 Hardy explored philosophical theory extensively, taking serious interest in the positivist account of Comte for example. According to Pinion (1974) 'The cause of things is neither moral nor immoral, but unmoral', '"loveless and hateless" I have called it "which neither good nor evil knows" Hardy wrote in 1920'.

> Stretched away, the contingent improbable human form, strengthless, emaciated, elongated, smelly ... his body was indeed a tomb, a grotesque tomb without beauty ... Death refutes induction. There is no 'it' for it to be all about ... (*Bruno's Dream*, pp 11–13),

whilst through Nigel we are warned:

> A human being hardly ever thinks about other people. He contemplates fantasms which resemble them and which he has decked out for his own purposes (p 222) ... Time and space crumple slowly ... love is death. All is one ... the extended being tortured into a single point. Annihilation. *All is one* ... (p 29).

And for Diana, spiritual growth is accompanied by the stark insistence of the real:

> Life loving death itself ... Then she began to notice that everything was looking different ... a more august and terrible pain than she had ever known before ... she saw the ivy leaves and the puckered door knob ... with a clarity and a closeness which she had never experienced before (p 284).

In Fowles's *The French Lieutenant's Woman*, the play between such existential clarity and questions of identity, agency and gender is an overt and reverberant issue:

> ... he felt intolerably excited by the proximity of the moment of choice. He had not the benefit of existentialist terminology; but what he felt was really a very clear case of the anxiety of freedom...being free is a situation of terror ... (*The French Lieutenant's Woman*, p 295),

and though initially Charles seeks a steadying of this vertigo through woman:

> ... like a man who at last comes, at the end of a long high wall, to the sought-for door ... but only to find it locked. For several moments they stood, the woman who was the door, the man without the key ... (p 162),

he is at last brought to recognise that she should not and must not be burdened with, or made to personify, its resolution:

> ... a modern existentialist would no doubt substitute 'humanity' or 'authenticity' ... Charles ... has at last found an atom of faith in himself, a true uniqueness on which to build ... to realize that life, however advantageously Sarah may in some ways seem to fit the role of Sphinx, is not a symbol ... but is to be, however inadequately, emptily, hopelessly into the city's iron heart, endured ... (p 398).

By the time we reach the postmodern poetic of the 1980's, the 'existential', with its surreal and *hyper*-real qualities is at least as present as the real of 'traditional' rationality, the real of ordered materiality and ordered chronology, of controlled time and controllable space. There is a more profound distillation of the nature of existence when, instead of simply *narrating* the life of a powerless individual, whether through race or gender, that life is encapsulated in symbols:

> ... to live in silence is to live like the whales, great castles of flesh floating leagues apart one from the other ... (p 59). Now all my life grows to be a story and there is nothing of my own left to me. Nothing is left to me but doubt. I am doubt itself? (p 133) ... A tongue not cut off, but split, with a cut as neat as a Surgeon's, that drew little blood, yet made speech ever afterwards impossible ... (*Foe*, p 84).

Finally, in the texts of the year 2000, Professor Lurie in *Disgrace* cannot find reaffirmation in Byron and the elegiac Teresa, cannot resist the threat of purposelessness, but finds himself:

> In the opera neither as Teresa nor as Byron nor even as some blending of the two: he is held in the music itself, in the flat, tinny slap of the banjo strings … (*Disgrace*, p 214).

Whilst in *Super-Cannes*, the dismantling of the mystery of exclusive love:

> Dispelled the last illusion that each of us was anything but alone … (*Super-Cannes*, p 322).

And when woman no longer resolves that emptiness, but is equal in corruption, man finds:

> A strange crevice appeared in the area of her mouth, a vent of hell … (p 285),

which brings us full circle, to the mouth of Tess, taking on the aspect of 'a round little hole'.

The novels then are extraordinary in their congruent apprehension of this terrifying void, of the anxiety of existence when the reassurance of 'old' values, tradition and belief systems, the 'furniture' of a controllable reality, material, spiritual, moral – are exposed as less than reliable, perhaps non-existent.

In the texts studied, this vertiginous environment – the environment of the 20th century more than any other – carries with it doubt concerning the basis of the moral life, of the rational foundation of agency. The belief that the ordered material and ideological world – in which there is assurance that God's law and his institutions on earth, will treat us justly in return for virtue – collapses as an illusion. In *Tess*, this frees Hardy, enabling him to be an independent and stinging critic of the confluence of law and culture which transforms victim into perpetrator. The 'pure' agent, of virtuous intent, who places the interests of others consistently above her own, is condemned to ignominy – 'Once victim, always victim; that's the law!' as Tess says. The critique within the novel confounds absolutely the Victorian belief that 'the wicked' brought punishment upon themselves. And the claim staunchly asserted then as now – that the law is just and impartial, successfully distinguishing wrongdoer from wronged, is demonstrably an untenable claim as borne out by Hardy, contemporaneous law *and* the oddly congruent modern caselaw. In *Tess*, the terrifying chaos of the real is *compounded*, not ameliorated by law.

The 'empty room' and the recalcitrant table of *To the Lighthouse* provide a vivid focus for critiquing the illusory nature of man's power over the material world, even as he strives to conquer it intellectually. That woman plays a major supporting role in the male illusion of omnipresence with which he 'furnishes' the empty room, keeping his littleness and mortality at bay, is wonderfully mirrored in *The Viscountess Rhondda's Claim*. Yet at what price to woman? In *The Ministry of Fear*, Greene portrays the horrific moral confusion, the decimation and evulsion of metaphysical order and virtue once the world of traditional, chivalric ideology is revealed as a sham. In *The Heat of the Day*, Bowen too exposes this gentrified world as essentially empty of virtue, of moral life: both texts demonstrate an uncanny resonance with the *psychological* profile created by Rebecca West and Hannah Arendt. Indeed, the dying claim of patriotic allegiance to England pronounced by William Joyce – 'Lord Haw-Haw', is otherwise inexplicable. The values of personal, institutional, political and cultural life impinge in ways unrecognised and

unacknowledged by legal science, yet ironically it is that very collision of institution and human psyche which, at least in part, *produces* 'deviant' behaviour.

In the rationales offered by legal theory and legal science, persons inhabit a 'fixed' identity, where 'capacity', 'rationality' and 'free-will' are presumed characteristics of the majority. In *Bruno's Dream*, resistance to the incursions of the ugly, unreliable and contingent 'real' is negotiated via characters who are only rarely equipped to meet the challenge. Here we glimpse persons who, in contradistinction to any outward appearances in terms of intellect and experience, display *variable* degrees of capacity, rationality and free-will in direct relation to their positions on a less visible 'register' of emotional and moral growth. Nor are all characters, whatever their worldly or intellectual advantages, capable of realising such growth. They occupy different loci in their potential to disengage themselves from the chains of their being and glimpse the entrance, the light, outside 'the cave'. Here, such personal qualities and limitations notionally supersede whatever qualities may attend upon sexual or social (including gender) identities. In addition, *The French Lieutenant's Woman* recognises that the process of achieving insight into self, of achieving spiritual and moral growth, flows from gaining, as far as possible, proper *distance* from those cultural and epistemological artefacts which support an *inauthentic* self in relation to others.

In *Foe*, the savagery of intellectual and material life, the savagery hitherto so neatly sidestepped in the historicity of *Robinson Crusoe* and the social contract 'canon', is acknowledged in full, so permitting a sober re-evaluation of all those *epistemological* structures which have kept 'reality' at bay. That this is expressed via a feminine interlocutrix who simultaneously pleads against the effacement of the sexual and racial 'other', imposes an ethical challenge not merely to epistemology, but to politics. This theme is elaborated in *Disgrace*, where not only the face of the record – history, but also the cultural, in particular *aesthetic*, structures are dismantled, revealing aesthetics itself as a disguise, rather than flower of the Enlightenment. With *Super-Cannes*, the collapse of the world of ideals, of material beauty is complete: in its place an ugly materiality in which persons are units of utility, the predator reigns supreme, the world of virtue, of aspiration to virtue, contemptible. The claims of normativity, the 'ought' derived from an 'is' – in short, the claims of the moral which underpin legality are circumvented and irrelevant. Or are they?

Revisiting the texts, their tussle with an unwieldy 'real', with the anxiety of being, bears testament again and again to the preponderance of human frailty rather than a propensity for evil. Even the gratuitous cruelty in *Super-Cannes*, the quest for selfish gratification in *Disgrace*, are represented as weaknesses, frailties; in the one case latent psychotic tendencies are facilitated by group norms, in the other, predatory behaviour all too easily supported by an inner self harmonised and legitimised by culture and aesthetics and contradicted only in part – if at all – by broader 'social' norms. Characters in *Tess*, from Tess to Angel, even the mustache-twirling seducer Alec, all recognise the world of obligation, but their willingness, and ability to *respond* to normative values depends upon how they are 'positioned' in relation to the world of normativity. Though Alec is least susceptible to normative pressure, he is not immune to it: for a while he even experiences a religious 'conversion' albeit uncharacteristic and thus fleeting. Angel responds to normative values derived from his religious and bourgeois roots, only realising these to be a 'false' source of values when it is too late. Tess is a hard working

peasant girl who tries to do right by her family, by Angel, even, until the fatal hour, by Alec. For all of them, it is the *cultural* environment of normativity which fails them and is so vehemently condemned, not the human potential for virtue. In *To the Lighthouse*, persons are similarly afflicted with frailty; it is frailty, not malevolence, which perpetuates male bombast; frailty which in its turn feeds upon and thus begets female frailty; indeed there is a degree of comedic reciprocity in the exchange. Again, normativity reigns, but in its cultural production, it is inherently selective, resulting in the perfect symmetry, the 'consistent' justice of *The Viscountess Rhondda's Claim*. In the chaos leading to and including war, Graham Greene and Elizabeth Bowen reveal the fracturing of the very values underpinning the belief, the aspiration to virtue. Neither God nor metaphysics provide reliable lodestones by which to chart a course through the chaos; the virtues themselves seem to have played a part in the *mêlée*. Yet throughout both texts there is a subsumed but sustained belief – almost unspoken, unnamed – that the 'will to good' will prevail. This theme is reproduced and elaborated in the texts of the 1960s, of Fowles and Murdoch. Indeed for Fowles, the will to authenticity bears identity with the will to good, whilst for Murdoch, the dismantling of material illusions, sheer confrontation with the barest facts of life – love and death – results ideally in a normative world so predominant as to negate purely egotistic individual claims.[4] With *Foe*, there is some scepticism, certainly from the 'feminine perspective' as to whether such a world of disinterested normativity can be achieved; and indeed the 'unknown' world indicated by the yet unrealised reclamation of marginal voices, begs a question regarding the means to such disinterest – a Rawlsian dilemma. Finally, both *Disgrace* and *Super-Cannes* may in their separate ways be regarded as exercises in the dismantling of the 'old' road to normativity. Lurie's 'inner voice' responds to normative values; yet they are at one and the same time entirely coherent and plausible, and utterly untenable. In *Super-Cannes*, civic values, civic life, creates an environment and veneer of civility which enhances the perpetuation of an aetiolated, internal normative world. To the executive world, to wives, to the corporate profit, 'is' may still produce an 'ought', but at a price to others which devalues the sole action and the entire structure. The reader is clearly invited to recognise the failed normativity that this entails.

But there is one key aspect which has so far been left out of this picture, a theme which recurs again and again throughout almost all the novels – the role of woman in this mediation between the material and the moral.

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4 This is a prevailing theme in Murdoch's fictional and philosophical writings, which together form a continuity of position: Murdoch ((1999), p 87):

> It is the role of tragedy, and also of comedy, and of painting to show us suffering without a thrill and death without a consolation. Or if there is any consolation it is the austere consolation of a beauty which teaches that nothing in life is of any value except the attempt to be virtuous …

As will be seen, this squares well with Korsgaard's 'reflective endorsement', though for the law, which is entirely concerned with the regulation of competing expressions of selfhood, such 'unselfing' seems an aspiration distant indeed and, at least in part, antagonistic to the forms of selfhood the law sets out to protect.

'THE WOMAN WHO IS THE DOOR, THE MAN WITHOUT THE KEY …'

This quotation, from *The French Lieutenant's Woman*, reflects a viewpoint which obtains in the majority of the novels studied. As has been noted, *all* of the novels deal with serious philosophical themes; with the anxiety created by 'existential freedom', with the concomitant crisis in the moral life heralded by that freedom. The epistemology through which both philosophers and society at large commonly understand the moral life – that of metaphysics, in its divine *or* secular form (and rendered intelligible for 'the masses' through the language of 'good' and 'evil' *or* elaborated for the moral 'technician') is called to account by all the texts. In addition, the texts give proper recognition to the inextricable connection between the relation of the individual to the world of moral values and the construction of individual identity. Simply, the credibility of the 'inner world' of the self must relate in some way to the 'outer world' of values (in the legal texts studied in tandem with the texts of each chapter, this is a latent theme, to which this discussion will return).

Somehow all the characters interrogate and negotiate this brave new world of the 20th century – the world of disrupted values. Nor is their interrogation naïve or simplistic, but conducted with full as much awareness of the philosophical implications as that employed by philosophers and jurisprudes themselves. Just as philosophers use the imaginative projections, metaphors and narrative techniques of fiction to shape practical ethics modelling, so also these writers use fiction as a vehicle to test the moral world, the world of ethics, in which their characters must survive. Of course, philosophers will object that there are differences of disciplinary constraint and focus between the two activities, and this point should be well taken. However, the traditional *deference* paid to philosophy in recognition of this difference should not become paralysing. A major difference is that the philosophical model is 'reined in' to respond to the philosophical environment in which it is born, whereas the philosophic fiction-writer can respond not only to the topical context of this moral critique, but allow imaginative, and perhaps more freely unconscious *play* with the issues. As has been seen, this has allowed many of the writers to adumbrate fresh epistemological material to the debate – Ballard's combination of psychiatry and anthropology in his model of human nature, for example. It has also facilitated a degree of detachment from dominant cultural practice, a detachment not always achieved by philosophers – witness Hardy's prescient critique of prejudicial and morally indiscriminate conventions.[5]

But this combination of critique and less inhibited 'play' seems to account for the repetitious 'location' of woman in the texts (a factor clearly beyond the purview of traditional philosophical theory, where problems pertaining to sexual identity are remediable simply through the politics and logistics of 'equality' discourse).[6] In

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5 Conventions in which many *philosophers* of Hardy's time were enmeshed, and which the law exemplified.

6 Again, recall that several feminist theorists, Lacey in particular (1998), indicate that conventional philosophical and liberal jurisprudence and political theory simply 'factor out' the issue/s of gender and sexuality as significant to theory. The texts studied herein appear to reveal an underlying relation between subjective *ingestion* of metaphysics and intersubjective relations which, however subliminal, may *inform* this denial.

traversing the *metaphysical* uncertainties of modern life, in recognising the triumph of an impoverished and amoral world of 'convention' over any truly 'ethical' world, most of the texts return the traumatised moral gladiator *into* the arms of *woman*. Now an immediate and understandable reaction to this observation will be 'but of course' – the world of fiction is one of escapism, of romance. But this must be a wrong conclusion. For given the comprehensive seriousness with which the philosophical critique in each novel is conducted, above all, given the very focus shared by most of the books, upon the injustice of *personifying* woman as the locus of moral ills; the portrayal of woman as 'the door' – as Fowles, by his use of that term clearly indicates – is intrinsic to understandings of the problem of existence itself, and to all those issues of value attendant upon existence.

To explore this point, we must briefly return again to the texts. Beginning with *Tess of the d'Urbervilles*, we find that, having given full recognition to the philosophical and moral failings, social, religious, legal – in short *cultural* – which have made 'virtue' a victim, the book ends with Angel Clare setting forth hand in hand with Liza-Lu, the young pubescent sister of the deceased Tess. This scene is variously accounted for. In the text itself, the liaison has been promoted by the condemned Tess, apparently in an odd attempt to combine brotherly protection with the promise of an *unstained* reincarnation of the ideal relationship. A legal-historical perspective of the union indicates the characteristic, Hardyesque irony of creating an ending of idealised promise which may not be fulfilled, given the provenance of the Deceased Wife's Sister Act, which prohibited such marriage. Perhaps a simple explanation is that Hardy, though a progressive and radical social commentator of somewhat jaded aspirations for the human race in the light of his life-long observation of it, wished the relationship to symbolise promise for the future. In this new union, the ills of society might yet be righted. But it is an odd ending, given that those very ills are clearly just as ready to swallow up the likes of Liza-Lu, and that neither she, nor Angel are likely to have much control over the matter. In some obscure way, it seems that the radiant purity, the incandescent goodness of Tess simply cannot be extinguished so absolutely. The text recognises the inevitability of her execution, but in some indefinable way, she is resurrected so that the hapless, latterly misguided but now chastened man may continue on his way.

In *To the Lighthouse*, such resolution of the existential void through woman is to a great extent resisted; the empty room *persists*, while human life occurs in parentheses: this text perhaps above all others truly confronts the marginality and mortality of man, within 'the void', with equanimity.[7] Locating the *ratio* in *The Viscountess Rhondda's Claim* in a 'special' status accorded to women, which preserves them as icons of dignity whilst denying them the status of persons is less an act of cynicism or evasion than one of preservation of an

7 Yet the ghostly presence of the mother figure, of Mrs Ramsay is yearned for, and the final journey – to the lighthouse – has been variously explained, not least in terms of reunion with this presence. Similarly, Adam Gearey has suggested (SLSA Colloquium, Birkbeck College, September 2000) that James Joyce confronts existential death in *The Dead*, in the alienated preoccupation of the feminine 'other'. As this conclusion suggests, there is a subtle but important distinction to be drawn between the 'inauthentic' or not-fully-realised acceptance of mortality and insignificance when the protagonist is 'unseen' by his or her 'other', and the wholly mature acceptance exemplified in the 'empty room'. Adam Gearey's observation does accord with the 'residual' reliance on predominantly feminine 'essence' noted in the majority of these texts, clearly a phenomenon of psychological and psychoanalytic significance.

abstracted 'feminine' iconography – the 'trapping' of an 'essence'. In *The Heat of the Day*, the feminine narrator maintains her right to claim *inessence, despite* the utter inversion of values – the virtuous traitor, the treacherous patriot – related in the text. Contrast *The Ministry of Fear* where the 'retreat' into the feminine is even more marked. Though metaphysics, culture *and* religion have all been exposed as arbiters of flawed values, or rather, values which are dangerously susceptible to 'metabolisation' in ideology, the sole refuge of truth and virtue remains that of love – though even truth must be somewhat compromised in order to preserve the frail feminine understanding of the treacherous world outside.

In the texts which achieve the *apogee* of disinterested critique, combining consciousness of the moral doubts raised by existential questions, this retreat into the 'arms' of woman is more consciously resisted. Indeed, in *The French Lieutenant's Woman*, it is positively identified as a philosophically *illegitimate* retreat, whilst in *Bruno's Dream*, gender identity and sexual identity are located as mere physical incidents, the incidental carapace sheltering the person challenged to meet, as far as she or he is able, the greater questions of existence.[8] In *Foe*, this 'sexual retreat' is not merely theorised philosophically, but also politically: the postmodern form permits and requires fracture of such material incident.[9]

Yet by the time the year 2000 is reached, this apparent progression, away from infantile retreat, towards sober self-realisation, is no longer so clear. Though these two texts – *Super-Cannes* and *Disgrace* – produce the most uncompromising and potent attack yet upon the value-system which has *devalued* man, woman and child; though both recognise the centrality of sexual exploitation in this process, both also reproduce the route of 'feminine retreat' albeit in a more sublimated form. In *Super-Cannes* – having recognised the nexus between psychology, psychiatry, anthropology and any putative social contract, acknowledging that 'in the case of women the system of imposed psychopathy is already in place – it's called men', a theory more or less supported by the empirical study of behavioural mechanisms (whether rooted as much in nurture as in nature) – the narrator returns to the chivalric canon, rescuing his 'exhausted Alice who had lost her way in the mirror world'. In *Disgrace*, though the romantic tradition is comprehensively unmasked, its creature utterly stripped of his delusions and woman left with the insoluble fact of her role as reproductive currency in the war of worlds, there is nevertheless a preservation of 'feminine essence' beyond politics. The fat, unattractive Bev teaches man about humility and death, investing her energies in the ignoble nobility of animal welfare and disposal, whilst Lucy simply holds herself in suspension through biological essentialism; the 'earth mother' resigned to her fate. And that most persistent feminine retreat – the romantic Byronic Teresa, is simultaneously stripped of her romantic

8 Murdoch adopts a light and cautious approach to 'existential' implications, not least as a result of her reservations concerning the *application* and *mutation* of Sartrean philosophy. For a general political context, see Sinfield ((1989), p 92).

9 It is a welcome fact that much of the more terse critique of links between gender politics and 'broad' politics in these books derives from *male* authors, particularly Hardy, Fowles, Coetzee, Ballard; reader impact might have been less universally strong if the critique emanated from women themselves – to be so easily dismissed, at least by some, as the 'disaffected wail' of the disaffected. There may also be some significance in the fact that, of the writers studied, it is two female writers – Woolf and Murdoch, who squarely confront existential mortality. That this *may* be 'innate' to the feminine perspective, or a result of marginal cultural location, or mere fluke, renders any firm conclusion on the matter unsafe.

garments, thus removing the mythology which has cradled the self-deluded man, and identified as 'the last one left who can save him'. Though she:

> ... pushes out her breasts to the sun; she plays the banjo in front of the servants and does not care if they smirk. She has immortal longings, and sings her longings. She will not be dead ... (*Disgrace*, p 208),

she is yet the last bastion of humanity, in whom dignity resides in the very indignity forced upon her.

This retreat to the feminine may have various explanations. We cannot know whether the (almost *inadvertent*) return to such essence in the most modern texts is:

(i) incidental; or

(ii) indicative of a particularly entrenched or irreducible aspect of the 'locus' of the feminine in (predominantly masculine relation to) *meta*physical 'reality'; or

(iii) indicative of an immanent retreat from the 'routing' of essences attempted in the texts of the 1960s; or

(iv) an intriguing yet concomitantly *disturbing* co-factor to any imminent deontological 'revival' ushered by a retreat from consumerism.

Certainly, for many of the writers, there is a kind of 'political correctness' operating where, having acknowledged the oppression of women as critical ingredient in the construction not only of masculine identity, but the world of values which form his cradle, humble self-abnegation is the only tenable alternative. Yet the very act of abnegation heralds an inherent indication that woman maintains an elusive 'essence' which will set the world to rights. If the most *terrifying* indication of an immanent void is the transmutation of the feminine mouth into 'a round little hole', a 'vent of hell', this surely indicates the degree of investment placed in maintenance of her image.[10] Such faith in a feminine essence as the last bastion of humanity is touching, especially given her virtual effacement from the record. But it simply recasts the objectification of woman,

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10 For psychoanalytic theory, such a location would have clear significance, in terms of the play between lack and desire, object-relations theory, woman as *anima*: psychoanalytic theory does appear to 'circle' around some fundamental 'truth' in this regard. Difficulty lies in locating this truth and *relating* it to a better understanding of human agency, especially for practical legal purposes. This convergence of the existential 'in' 'woman' may have multiple explanations in psychoanalytic theory. Most obviously the references to the mouth as a site of emptiness or corruption may correlate to ambivalence towards female genitalia as well as feminine autonomy. Lacanian theory might consider the role of the mirror phase, of lack, desire and of 'jouissance'. For Irigaray, the *physicality* of the mouth-genital orientation would be crucial. Klein's object-relations theory seems particularly useful as a model – there is (Wright (1984), p 80):

> ... an awareness that good and bad can alternate and co-exist within a single concept ... the same ambivalence could be claimed to infect all our attempts to apprehend the world in terms of self-favouring images ... These alternating states can persist throughout life ...

Certainly, the failure of psychoanalysis to pay central attention to theorising the mother and the feminine seems called to account considering that gender relations, sexual identity and existential anxiety seem to converge in a troubled psyche: howsoever psychoanalysis may seem a 'marginal' discourse in institutional epistemologies – those of legal doctrine for example – there is clearly a key issue at work here. Yet the danger with psychoanalytic theory is this very claim to a more 'fundamental' truth. Like other idea-systems, psychoanalysis tends to use a rhetoric which cannily 'naturalises' conjecture as fact. Though empirically unstable, this tendency in psychoanalytic explanations of human motivation may be all the more seductive and misleading because claiming authoritative knowledge of our 'inner' and 'secret' selves. It is the Pythonesque conundrum: 'Oh yes, but you're *denying* that X is motivating your unconscious because you're *in denial* etc, etc ...'

burdening her with an unwieldy weight of moral responsibility vis à vis the rest of the world.[11] And being made the locus of such moral essence may come perilously close to reawakening in some form a political-ideological fundamentalism which makes an icon, and ultimately a fetish, of this essence, as is already the case with some overtly fundamentalist belief systems in the world. Indeed, it could be argued that sleight-of-hand fundamentalism already subsists in the location of woman *beyond* full civic being. In her effective infantilisation in the abortion equation, even in the maintenance of a social order where her pivotal role in the sphere of 'private' life is poorly recognised, her access to an alternative empowerment in the 'public' sphere beset with trials, the authenticity of moves to bring her into full being seem token. Concomitantly, the post-industrial age is producing a disorientated, disaffected and often 'redundant' male, in a context of increasing self-interest and violence, yet any 'essence' expected of him seems peculiarly unambitious. To belong to a group ascribed inherently low moral expectations by society may prove to be at least as de-moralising and destructive as an identity derived from an impossibly conflicting 'essence'. And of course both forms of identity are only aspects of other marginalising factors affecting both sexes, of race, of class, of opportunity.

The retreat into feminine essence may simply reflect a material factor *resulting* from the realisation of 'political correctness' – that the feminine is a largely unknown and uncharted territory, that the 'feminine perspective' may yet hold possibilities for humanity, for understanding 'human nature' as yet unexplored. Many feminist theorists subscribe, understandably, to this view: the theorisation of the 'ethic of care' is one aspect of such speculation. In those rare places where women *have* gained access to positions of power, they have sometimes shown themselves to have 'a different voice'. But for both male and female theorists, there is a danger that 'colonisation' of this uncharted territory – the feminine – however lovingly, will simply reproduce many 'old' mistakes in terms of 'essences' and polarised stereotypes. For the only fact of which we can be sure at this juncture is that our maps are incomplete – whether they be maps of the psyche, of genetics, of nature, nurture, sex, the construction of identity in both men and women.

Yet the return to the feminine in the texts studied may hold a further significance, simply that, as 'cosmic orphans', as vulnerable beings of uncertain properties, it is only in relation to other human beings, to *an* 'other' human being that our moral lives can begin. When Hillel Steiner, in expounding Hohfeld,[12] explains that 'rights' discourse is meaningless without someone against whom to assert the right; that therefore every right predicates a duty, it is a recognition of the 'social' nature of 'rights'. That 'social' aspect is usually theorised in terms of the community, of the individual civic unit as against other individual units *and* as against the civic collective. It is mainly feminist theorists – and the rather 'esoteric' world of psychoanalysis, of Freud – who have insisted upon recognition of the 'domestic' sphere as a vital component of this civic world. Processes of 'socialisation', 'individuation'; realisation of selfhood and identity, acquisition of language – all occur initially and crucially in the domestic sphere. Such statements may hold but fleeting significance for political theorists and jurisprudes in part because it introduces concepts and epistemologies regarded as traditionally marginal to the 'larger' questions.

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11 The parallels with Fitzpatrick's discussion of Freud, of 'sacred' essence and 'feminine' essence are notable; Fitzpatrick (2000).

12 Steiner in Kramer, Simmonds and Steiner (2000).

The *images* to which they are attached also conjure a sense of a world of 'littleness', a world of petit- and petty-domestic, of the 'knitting-circle' realm of politics. Yet that world of moral cognition, of rights predicating duties, of inculcation of the individual to the social, of *normative* values which form the basis not only of private but of public morals, of the boundary between civil and criminal – that world starts 'at home'. And in the home, 'social' relations are intimately tied to 'gender' relations as an interface of comfort, of power, of morality. This focus upon the 'domestic' and 'intimate' as a source of morality is a remarkably persistent theme throughout the texts. Yet, like the public world, the values at work in the private do not operate in isolation, but in a complex flux with the values promulgated by the public sphere, and those more nebulous and fleeting cultural values which mediate between the two.[13]

The 'retreat' into the arms of the feminine in these novels may in the end then be a –more or less – conscious recognition of this simple link, so slighted in conventional modern philosophy: that it is in personal human relations, which so often (though not invariably) involve the male-female nexus, that the ethics of public human relations begins. In the earlier novels it appears to operate at a less 'conscious', and it must be said, more 'instinctive' level. Such 'instinctive' narrative retreat is in itself revealing. In the later novels – especially *Super-Cannes* and *Disgrace* – the juxtaposition of the 'retreat' alongside a questioning of the ethics of male-female relations, of such relations as microcosm of political ethics, poses a sophisticated and troubling challenge to the philosophical frontier and established philosophical method. Yet as already indicated, the irresistible depiction of feminine 'essence', of iconic 'virtue' is complex: does it reflect still a kind of psychic refuge? Or a 'truth' at some level? Or the persistence of stereotypes even in the very act of their disavowal? Or recognition that 'love' and 'death' are our only certainties? Whichever may be the case, singly or in combination, such questions have real significance to the constructions adopted, and not adopted, by politics, philosophy, law.

The significance of this world of personal relations is not simply conveyed in a return to feminine essences and feminine arms. The very complexity, the 'weblike' structures impinging on these traditional identities is revealed in the surprising persistence of the domestic theme. Again, in the later novels, the deployment of 'the domestic' is a politically conscious move. Yet the depiction of the domestic world in the earlier novels is equally, if not more revealing in some ways. Yes, it may be argued: the law cannot take too much cognisance of how little abuses, failures, encroachments, exploitations, in personal relations, lead to more significant events. But the link, for example, in Greene and Bowen, between the construction of the individual psyche in the private sphere and participation in destructive or aberrant behaviour in the public sphere, is interesting. When juxtaposed with the case of William Joyce, it is disturbing and prophetic, an indication of the importance of the private world, the world of the psyche, when political

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13 Murdoch's location of major philosophical questions within the domestic sphere pays homage to this fact; the 'Cave' serves in this other sense – the intimate or apparently banal, is continuous with the 'wider' moral world (Murdoch (1999), p 96):

> Plato sometimes seems to imply that the road towards the Good leads away from the world of particularity and detail. However, he speaks of a descending as well as an ascending dialectic and he speaks of a return to the Cave. In any case, in so far as goodness is for use in politics and in the market place it must combine its increasing intuitions of unity with an increasing grasp of complexity and detail … True conceptions combine just modes of judgment and ability to connect with an increased perception of detail …

or philosophical assertions are made. The same can be said of the public/private, fiction/caselaw observations in Hardy. For Woolf, the link is clear – that the little tyrannies of the home lead to the tyrannies in the public sphere. For Woolf these tyrannies are primarily – one might say primally – enacted between the sexes. The social observation in her novels, as with that in her diaries, bears this out, though not *invariably* so. The occupation of a position of power over others requires the most stringent exercise of integrity if it is not to lead to abuse; in Woolf's day, such power resided almost exclusively in the hands of men. Their subtle choreography of the law reflected this. Woolf pioneered and advocated the developed recognition of 'androgyny of the mind' – an attempt to reclaim and recolonise those artistic and intellectual frontiers so effectively dominated by male discourse. The concept is imaginatively challenging and exhilarating, though not without problems, as modern feminist theory reveals, with the somewhat insoluble difficulties surrounding 'essentialism' versus 'anti-essentialism'. Nevertheless, though the realm of the private and domestic has long been asserted, both in theoretical and practical terms, by feminist theorists as a major site of significance, conventional jurisprudence – and most political theory – has smiled politely and looked the other way. Such issues seem not to have been the stuff of 'Big Theory' and (it is thought) can be remedied by minor cultural and social adjustments. Yet the persistent perspective of the *literary* imagination placed alongside those more formally positioned philosophically, calls such philosophical dismissal to account. Philosophy, political theory itself perpetrates a failure in ethics.

It is only in the novels of the 1960s that we see a fully effective break away from gender as a *dominant* locus in the formation of the moral self, and this break creates possibilities and problems. Fowles's location of 'the woman as the door' clearly indicates a recognition that gender identities have been pivotal in the creation of personal and public identities and ethics. The refusal to sustain woman in this locus is an attempt to prioritise the claim of all persons to personhood before gender, and he reaches this conclusion via the enabling detachment of existential thought, with its focus on the search for an 'authentic' self – and by his reckoning, to be authentic is to strive to be ethical, in a world of ethics which begins at home. To do otherwise in this mortal life is to risk being a mere 'empty shell', an incidental ammonite fossilised in the by-way of historical mud. Murdoch too 'connects' the priority on the development of ethical personhood with a kind of 'existential' context, though in a more general sense. Her primary allegiance is traced from Plato to Kant, and it is through their philosophies that she arrives at an image of ethical life wherein the individual – regardless of sex – must strive to develop the moral self. Murdoch distances herself from 'existential' theory *per se*, because she is apprehensive of the links between existential theory and excessive self-regard – that the search for 'authenticity' prioritises the self over the other, that it becomes a mere expression of ego, cannibalising all else in its wake – a justifiable concern in the context of present culture.[14] Yet a loosely 'existential' atmosphere is at work in her recognition that

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14 Douzinas explores this point extensively. To quote from ((2000), pp 199–201):

> … certain choices are inauthentic because they deny existential freedom. This is the case when a partial characteristic, such as race, nation, gender or tribe, is defined as the essence of belonging to humanity and privileges those who possess it against others who do not. In this sense while one can choose to be racist, sexist, nationalist or tribal, by doing so he prioritises – a false – essence over existence and naturalises belonging over freedom. This absolute freedom of self-creation should not lead to individualism and selfishness … Existential self-creation was not … [cont]

the depiction of mortality, death in all its ugliness – the ultimate confrontation with mortal 'reality' – is the most significant factor in the formation of personal ethics. 'Death refutes induction. There is no "it" for it to be about.'

The strength of these depictions is that they carry personhood and ethics into a single conception. 'Personhood', in the ethical sense, derives at first instance from the fact of existence, and thenceforward is nurtured by those who pursue conscientious cultivation of their moral selves. First and foremost this claim cannot be made whilst pressing upon the face of another, whether 'other' because of sex, race or mere separateness. As the exchange between Judith Jarvis Thomson and John Finnis demonstrates, this understanding of 'personhood' with regard to persons in being can be approached very differently. The fully *realised* notion of personhood first, gender an incidental second – developed by Fowles and Murdoch, is a model of radical possibilities. Simple in its conception: who but an extremist would deny that any individual should be counted as a fully realised human unit – a person – before 'defining' them by the incident of biological identity; the proposition contains linguistic, imaginative and ethical difficulties. The linguistic problem derives from the poverty of language, whereby the meaning ascribed to 'an individual' must be distinguished from that ascribed to 'a person', with that concept in turn properly distinguished from whatever might be implied by 'biological identity'. Even with elaboration of each concept (and the law is perpetually engaged with identifying the definitional nuances of each), the act of interpretation – the process of reading – will bring diverse cultural assumptions to the process. The imaginative problem is greater still. It is probable that, quite apart from the clear difficulty encountered, and likely to be encountered by men in achieving complete realisation of 'personhood' in their conception of 'womanhood', the vision is also problematic for women, including *feminist theorists themselves*. For both sexes, the ability to give full imaginative credence to the primacy of personhood may have been facilitated, rarely, by a particularly enlightened upbringing or education. But the rarity of such an eventuality is borne out by the continuing dominance of identity constructions deriving from gender, or from a muddied invocation of personhood via gender. And cultural history is virtually *devoid* of representations of women where personhood is given full imaginative realisation before 'woman'hood, creating difficulties of realisation for *both* girls and boys, men *and* women, in the apprehension of feminine personhood.[15] This is reflected in the feminine characters from *Tess* to *Disgrace*; it is a factor underlying the rationale of many of the novels. It is the factor underlying past and present differences in the treatment of women by the law, a problem not merely of equality, but of identity. In pregnancy and 'enforced caesarian' cases there lingers the shadow of an infantilised, incapacitated psyche. In the criminal law, a tension between paternal and punitive approaches to women still render them

14 [cont] part of the rich philosophical language of the eighteenth century. While we can use it today to explain partially the project of self-foundation of modernity, existentialism's enthusiasms underestimate the social constraints, historical determinations and conscious and unconscious structures which have succeeded classical *fortuna* in shaping modern subjectivity …

15 In feminist theory, Drucilla Cornell produces the most forceful and cogent argument for such a vision. For a discussion of the intersection of Cornell's work with theories of sexual politics, see Deutscher ((2000), p 80):

> What Cornell considers to lie before the law is not a fixed identity, but a right to form a future identity. What should be recognised by the law is that right, rather than an identity. While a process of evaluation is demanded, this is not an evaluation of a pre-fixed identity. Instead, new identities would emerge from the process of evaluation …

more likely to receive custodial sentences on a first offence, less likely to be considered 'reliable' or 'stable' persons.[16] From the little girls in Victorian caselaw whose acquiescence in sexual assault might be read as consent, to the women then and now whose victimhood and 'good character' plays little part in the administration of their justice because masculine paradigms have been 'grafted' onto them, there is a continuity of displaced personhood. It is the factor underlying *The Viscountess Rhondda's Claim*, the factor underlying the image of the 'split tongue' shared by individuals dehumanised because primarily defined by gender and race; it is the factor facilitating the 'disenfranchisement' of women in the 'abortion question'. But quite uniquely, in the work of Fowles and Murdoch, there is assistance provided for the real leap required to give full realisation to the idea of personhood entire. The image of Fowles's woman at the last refusing to return anything beyond a look asserting not sexuality but selfhood – 'a spirit prepared to sacrifice everything but itself – ready to surrender truth, feeling, perhaps even all womanly modesty in order to save its own integrity' (p 398) – of *spirit* before sex; the development of Murdoch's characters pitted each against a personal ethical challenge, regardless of sex – these images are of personhood entire. And they are mirrored in the ethical modelling proposed by Judith Jarvis Thomson, of the 'violin player' plugged into the circulatory system of a hapless individual, regardless of sex. It is the reason that Thomson's essay is so powerful, and likely to be so enduring. For it is only in the *imaginative* space created by such images, which re-problematise ethical challenge in terms of the contingent nature of ethical incident and the incidental acquisition of sexual identity, that ethics can be properly understood in human terms. That this may also implicate the male participant who has contributed to the creation of the ethical problem, that it may also implicate the social values which engender the conditions and 'gender' the parties, are additional considerations.

The response to Thomson raised by Finnis reveals his unwillingness, or inability, to give due recognition to this notion of woman as 'person entire'. Though biological – sexual – identity is not mentioned, it is implicit to his argument that the particular moral challenge raised by the problem of unwanted pregnancy must be borne; and that it can be resolved in only one way. As jurisprude, he must 'cleanse' his argument of gendered content, but it is there. The 'fundamental' claim of a potential life must *trump* the *putative* claim of feminine autonomy, a claim which is self-evidently less pressing because it is (usually) not that of 'life for life' but merely the *quality* of a life in being as against 'life' itself. The very foundation of moral values places the sanctity of life at the pinnacle of our understanding. Underpinning his argument is a call to altruism, and to the incalculable and opalescent potential for personal moral growth residing in the substantial sacrifice which gives priority to an as yet unwanted *potential* life, over the life in being. Yet ironically, the most potent ethical argument in favour of a 'pro-choice' construction of the abortion problem is that created by Finnis himself. Of course Finnis does not connect the model to the abortion issue. To do so would be to ignore the more 'fundamental' claim of

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16 See Worrall ((1990), pp 31–32):

> Criminality is still assumed to be a masculine attribute and women criminals are therefore perceived to be either 'not women' or 'not criminals …'. 'Alternatives to Custody' has been based on an acknowledgement of the challenge presented by 'persistent petty' male law-breakers.

life itself, of 'procreation'.[17] Nevertheless, his theoretical development of 'the human goods' and 'forms of human flourishing' lends substance to the model of personhood 'entire' raised by Fowles and Murdoch. In particular, the 'goods' of education – the pursuit of knowledge, and of life – 'the vitality … which puts a human in good shape for self-determination' must predicate a model of human existence wherein the living of a life means realisation of the unique self, development of the self and the conception, development and completion of projects unimpeded. The tension between achieving this ideal, whilst not encroaching upon the project-pursuing opportunity of others is central to much jurisprudential enquiry. But if the uniquely insoluble dilemma of unwanted pregnancy can only be resolved in moral terms by the sacrifice of feminine autonomy, consigning her to the place of biological determinism, to the fracturing of her development and projects, this places her in a second order position in the calculus of ethics, to a fatalistic, though morally uplifting, acceptance of her lot. And, so the consolation runs, from such self-sacrifice may spring moral rewards unwonted and divine.

Thus the image of personhood 'entire' created by Fowles would not square easily with Finnis. Though 'existential' uncertainty leaves men and women to negotiate an uncertain course through life, 'however inadequately, emptily, hopelessly into the city's iron heart, endured', the uniqueness of the *present* self is central to this journey. Yet Murdoch's version of the existential challenge is more problematic when aligned with the particular. Though producing the useful ethical model of individuals *variously* equipped to negotiate ethical challenge, though careful to 'universalise' the human characteristics which may obstruct, or further, moral growth *regardless* of sexual identity, her conclusion – that the morally superior life is 'the project' seems to threaten a similar collapse into fatalism. One might almost say that whereas for Finnis, the 'sanctity of life' trumps life-in-being, for Murdoch it is the omnipresence of death which so sobers any drive toward egotistical investment, that total effacement of self is the ultimate moral achievement – 'death refutes induction – there is no 'it' for it all to be about' – an austere conclusion for the masses, a luxurious one for an Oxbridge philosopher. In carefully placing the challenges to *being* above and beyond questions of sexual identity, the ethical model raised by Murdoch may, like Finnis, leave woman to her biologically determined fate (it is an odd echo of the decision made by Lucy in *Disgrace*, for whom a nascent ethics springs from the dignity in her indignity, where biological determinism is hopelessly and unavoidably set to be enacted and re-enacted 'upon' woman). Murdoch does not examine the potential for particular ethical dilemma raised by sexual identity. Presumably, the creation of a world view inhabited by persons inhabiting different *loci* in terms of intellect, class, personality, may by analogy *consider* how the *locus* is affected by sexual identity. All such characteristics are mere incidents – material obstacles, distractions – in the struggle to free oneself from the shadows of the Cave. On the basis of the philosophical world raised by Murdoch, this will be a matter of personal conscience and a reflection of spiritual enlightenment. For Finnis it is a matter not only of personal, but of public ethics, a matter for jurisprudence and law. As such it implies not only the imposition of *a viewpoint*, but of life choices. For Finnis, this does not seem to incur any resultant disquiet concerning the ethics of his own position.

17 In his jurisprudence, Finnis uses the term 'procreation', which implicates the 'joint' nature of the venture, but in his discussion of unwanted pregnancy and abortion, any such 'joint' aspect dissipates …

This lack of disquiet springs, as the earlier comment, by Riddall on Finnis suggests, from an underlying belief in the existence of God held by Finnis. It is the *possibility* of such an omniscient force or pure source, which further colours the world-view adopted by Murdoch. Platonic and Kantian values, and love, and death, inform her 'real'. No matter what one names the possible 'source' of such values, they are her reality, all else an illusion. Therefore we should strive humbly towards the cultivation of an authentic, conscientiously moral response to each contingent event, each chance encounter. *Since* 'death refutes induction', humility, self-abnegation, is the key to this journey. And herein lies the insoluble core of the moral dilemma created by unwanted pregnancy, whether located in a possible God, or in Kantian ethics. For the choice must be made. To put *oneself* first asserts a tenuous 'position' about the 'value' of one's own unique potential and one's own life projects – that, even though (probably) still in train, it is *more important that they are pursued unimpeded than the continuance of the potential life of another.* From a masculine perspective, the precise parameters of this moral choice are difficult to envisage and it is understandable that for many, it simply becomes a dilemma 'peculiar' to being a woman, an 'incident' of the incidental fact of gender. There is real difficulty in *imagining* how the world of values might be different if the dilemma were not sex-related – the imaginative space attempted by Thomson's violin-player. Certainly, giving priority to the life of a person-in-being, (provided that the model of woman as person 'entire' is accepted – person first, sexual identity second) – is implicit to the world of developing civic morals. The contribution of uniqueness, the potential for *creativity*, for the testing of the frontiers of human intellectual, artistic, scientific potential, is at the heart of present civic priorities in moral development. That woman is a hitherto repressed 'half' of this potential merely points up the need to ensure protection against further lost creative opportunities, for the sake of men, women, children – society itself. Such a view of personhood can be cast in a deontological mould as well as one based upon clear utility. No offence is committed against the 'categorical imperative' *provided* that the life-in-being is truly recognised as person 'entire' and the life not 'in being' is so much less so; that 'termination' or 'discontinuance' of its claim *cannot* be characterised as the execution of another as a 'means to an end'. In other words, the potential life must not be ascribed the status of an 'end in itself' which not only *meets* but *trumps* the person.

Yet we cannot *know* that this model of our individual lives is the 'right' model, though it is clearly dominant in the development of the culture of individualism, the culture under which liberalism and capitalism flourish. We cannot *know* whether an omniscient power – Finnis's God – exists, regarding such self-prioritisation as a damnable error. We cannot *know* whether, according to a deontological 'real', such pursuit of personhood 'entire' – regardless of sexual identity, regardless of the particular ethical problem confronting us – reifies the self, offends against an order of virtue which commands the abnegation of self. If 'death refutes induction – there is no "it" for it all to be about', the assertion of personhood in an 'entire' sense by *anyone* – man *or* woman, may be cast as a pragmatic recognition of the claims of material existence, a humanistic support of the cosmic orphan on life's journey trying to make the best of the enigma of being. *Or*, according to Murdoch's rationale, traced through Plato and Kant, such an assertion is in danger of supporting an act of narcissism, a fetishistic attachment to the shadow on the wall of the cave which most faithfully resembles the self. Yet where does the sober and ethical cultivation of the creative moral self meet this looming narcissist? The boundary

between the two is poorly indicated by modern moral philosophy. And whether, or how it should impinge upon the 'biologically determined' self is a major challenge for moral philosophy, not just for 'the self' but for the whole community. If the sacred uniqueness of *all* lives is truly meant to be valued by humanity, social organisation should reflect this in ways other than making woman a prisoner of her bodily function. Quite apart from the question of parental volition qua the creation and continuance of pregnancy, arguably, if one party to the conception of a potential life should put aside their projects because that potential is of fundamental importance, then so should the other party. Unless one subscribes to a Biblical view of identity whereby gender prescribes roles, the only ethical conclusion to be drawn is that the potential lives of unwanted pregnancy must 'trump' the claims of the biological father *at least* as much as the claims of the mother. Since an incident of nature has proclaimed that woman, not man, must 'house' the life – and that it is not carried in a pouch in the father's mouth, or his back, or his swim-bladder, for example, then arguably the 'trumping' of paternal claims to potential should be more extreme, in order to 'compensate' for the exceptional sacrifice, risk and interruption involved in providing the biological 'house'. The modifications to social values and social order that such a model presents would be ethically challenging indeed.[18] Not only cultivation and worship of the material, but the remnants of biologically determined man would have to be defeated. Is such altruism, such mutual balance of personhood, such ethical conscience the proper goal for the moral life of the individual, of civilisation? Or is it a ridiculous, unreachable aspiration? Such universal, non-gendered sacrifice, by individual and community, would be truly catholic. And if the faith upon which Finnis covertly founds his philosophy is misplaced, a misapprehension, there is surely a grave ethical rebuke due to him who would impose such systematic philosophy *with the force of law*, when it impinges most forcefully on others, on a particular type of 'other', on frequently, an already unempowered and disadvantaged 'other'. By no means is this to be construed as an accusation of 'bad faith' against Finnis, whose philosophical propositions clearly reveal principle and integrity. It is rather a reminder that the Biblical roots of natural philosophy, whatever its claims to universalism, must either be admitted to impinge differently upon the sexes, each with their own biologically determined ethical problems, or must undergo radical alteration, perhaps 'modernisation', both root and branch.[19]

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18 Stereotypes would have to change; it is still assumed that lone mothers, who statistically bear the major burdens of parenting, must be 'naturally' equipped for the tasks of parenting. Fathers absent themselves *en masse* and this is condoned in the broad acceptance of their non-involvement. *Fathers* who take responsibility for their children are regarded as heroic. Yet when women fail to cope, they receive little sympathy ('Mother jailed for child cruelty' (2001) *The Guardian*, 26 May).

19 This discussion concentrates upon the aspects of social and moral organisation which impinge upon the claims to personhood of woman; it does not deal with the issue of general moral and social failure reflected in the statistical incidence of abortion, which is commonly associated with the sexual activity of women alone, and *within* which – it cannot be denied – potentially unique individuals are disposed of, sometimes in barbaric conditions. As with death itself, our 'consumer' society cultivates a hedonistic lifestyle, where the mortal facts of its incidents and appetites are disguised. A truly ethical society would cultivate the active engagement of all members of the community in reviewing such issues, for the entire community is implicated. Neither doctors, nor women alone should be cast adrift to face this brutal underside in a moral void; nor should the delusion be maintained that a sexual and ethical Utopia can be achieved where unwanted pregnancy simply does not occur and the need for abortion becomes obsolescent.

THE EXISTENTIAL AND THE NORMATIVE

Our ability – and willingness – to respond to the claims of a moral order is reflected in all our actions – in everyday relations, whether intimate, social, public. Much legal debate is concerned to delineate appropriate spheres of legal influence. With justification this has meant that activities considered innately 'private' should be relatively unfettered by law indeed, an overweening interference in the minutiae of daily life poses a severe threat to human flourishing whatever model of society we subscribe to. But the traditional assumption that 'private' or 'personal' morality and 'public' morality are easily separable is deceptive. Traditional conceptions of the separation have tended to serve masculine views of appropriate boundaries. It is right that not just feminist jurisprudence, but all jurisprudence should continue to question the credibility of these boundaries. For, as we have seen in the hypotheticals of fiction and in the narratives of fact, in jurisprudence and caselaw, in the judge and judged, the moral agent undergoes construction in the tension between his or her public and private 'selves'.

Thus far, consideration of the 'existential' aspects of the novels has focused upon the philosophical uncertainty derived from the 'anxiety' of existence, the disruption of the subject in relation to a (formerly harmonious) material real. The novels evidence a resultant unease experienced by the subject interacting with the normative world: as the world of fact is fractured, so too is the world of value. A similar unease can be traced in developments and alterations in jurisprudence and philosophy. In making adjustments to the perspectives of purportedly ahistorical ethical structures, both attempt to absorb and harmonise the fractures posed by historical contingency. Such adjustments are reflected in the moral resistances and adaptations of legal convention. And with the legal subject of concurrent caselaw sometimes gaining, sometimes losing from the changed perspective, he or she is anyway envisioned as actively engaged as moral agent in the currents of belief.

Indeed an additional aspect of existential consciousness – 'anxiety', unalloyed mortality, indifferent materiality aside – is the claim that the realisation of existence *absent* the certainty of an organised Universe and divine hand, brings 'existential *freedom*'. No longer directed, guided, man as cosmic orphan realises the magnitude of his role as agent. As Fowles expresses it:

> … and the 'I', that entity who found such slickly specious reasons … felt intolerably excited by the proximity of the moment of choice. He had not the benefit of existentialist terminology; but what he felt was really a very clear case of the anxiety of freedom … being free is a situation of terror … (*The French Lieutenant's Woman*, p 295).

Yet though the world of *ideas* may have brought the individual – or our conception of him – to an awe-inspiring moment of freedom and responsibility (a moment immanent in the claims *and* dying refrains of classical theology and Enlightenment philosophy) still doubt must remain as to the *empirical* breadth, the 'reality' of this free agent. The wide variations in the possible characteristics of 'human nature', the probable dominance and relative instability of that similarly enigmatic 'psyche' – these factors form key ingredients in any discussion of the moral agent and the world of normativity. Yet both are strange admixtures of fact and conjecture, 'fixing' the individual with qualities he may not

possess.[20] And in addition, however unacknowledged, these factors – part fact, part artefact – create offspring, frequently unacknowledged, concerning the *particular* characteristics ascribed to each sex. Like the subjects of law, the characters in the novels inherit this assumption of agency; indeed it would be almost impossible for the worlds of law or fiction to orientate individual existence without this assumed autonomous self. At sea in their respective worlds of historical contingency, we see the characters attempting to engage with the world of value, the moral world, as it impinges upon their moment. Whilst philosophy attempts to claim a largely ahistorical mediation of fact and value, the subject – in fiction and in life – must negotiate a path, perhaps truce, between the immediate, contingent world (in terms of both personal and ideological 'history') and the alleged permanence of the world of values.

Under God, free-will had immortal as well as moral significance. If we are alone (and free to use will wantonly as Riddall implied in his discussion of Finnis), from whence might continuing moral obligation derive? Christine Korsgaard is a key modern theorist concerned with locating the source of moral agency. It is incontrovertibly the case, at least in the Western world, that the anxiety of existence so prevalent in the 20th century, the increasingly evident fracturing of a reassuring spiritual and material order, has coincided with an increase in the dominance of materialism. As Korsgaard explains (Korsgaard (1996), pp 1–4):

> 'Value' has been reversed ... for Plato and Aristotle, *form* is more real than *matter* since matter is just the potential for form ... The death of God did not put us back to this step. We no longer think we are what is wrong with the world – for us, the world is now first and foremost matter, not form.

Yet though our present world is dominated by materialism, Korsgaard claims:

> ... the ethics of autonomy is the only one consistent with the modern world and the ethics of autonomy is an ethics of obligation ... (p 5).

Contrast this with the Sartrean existentialist, for whom autonomy ordained the requirement to be 'authentic' in freedom, a quest which did not *necessarily* predicate a requirement to seek the moral life. Yet, though 'authenticity' is a central plank of the rationale offered by Korsgaard, the autonomous agent is *logically* bound to conclude that moral obligation – normativity – is personally instrumental: existence predicates not merely agency, but *moral* agency. This view is derived from her model of the autonomous individual. Korsgaard asserts that we respond to 'the normative question' – 'what justifies the claims that morality makes upon us?' provided three conditions are met:

(a) the answer must succeed in addressing someone in that position

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20 The implications for the law and legal doctrine are immense. Take for example the comments that:

> ... the last hundred years have shown, not beyond all possible doubt ... that there isn't any such downward causation [between mind and brain] ... Nothing influences the brain except other bits of the brain. So if you accept that, then dualism is forced into the view that the mind is kind of impotent. It's floating above the brain, perhaps caused by the brain, but it doesn't make any difference. This is called *epiphenomenalism*. The nicest model of that is the child with a toy steering wheel that thinks it's driving a car but in fact it's not having any influence at all ... (Papinau (2000)). Whilst on the other hand, Honderich replies: '... none of us really believes ... that thinking or feeling, or the experience of seeing, has only neural properties ...' (Papinau and Honderich (2000), pp 36–39).

(b) transparency: a normative moral theory must be one that allows us to act in the full light of knowledge of what morality is AND that our actions make moral sense

(c) the answer must appeal, in a deep way, to our sense of who we are, to our sense of identity – it must show that doing the wrong thing is as bad or worse than death … (or) what amounts to death – not being ourselves anymore … (pp 16–18).

Emphasis is placed upon the link between identity and moral obligation via Korsgaard's theory of 'reflective endorsement' – as each moral issue occurs, the subject absorbs the issue into the structure of personal identity and, on reflection (and provided the dependence of individual identity upon social identity is realised) the correct moral course will be 'endorsed' by the core self *but*:

> In the absence of reflection, the tendency to treat our *contingent practical* identities as the sources of reasons may be condemned as insufficiently reflective – if an agent consciously and reflectively *decided* to treat a *contingent practical* identity as giving him a reason that is ungrounded in moral or human identity, then he would be evil … (p 250).

Now it must be acknowledged that Korsgaard is not theorising the framework for a legal system. Nevertheless, since it theorises the source of normativity, it is deeply relevant to law. For jurisprudes, factors (a) and (b) of the three conditions of normativity are not dissimilar to the requirements of relevance, intelligibility and transparency identifiable in analytical models of legal systems, although (a) – 'someone in *that position*' – may perhaps tailor the requirement of relevance to a more 'personalised' view of the subject than is practical bearing in mind that there should also be an element of 'universality' in making rules recognisable as rules. Nevertheless, given the pre-eminent influence of personal identity in the three conditions, this particularity – however difficult to implement through social institutions, is clearly advisable. Factor (c) is the most challenging in terms of social and legal organisation. It is also potentially the most enlightening. For it is this factor in particular that we see at work again and again in the collision of the moral agent with broader social norms in fiction and in fact.

In accordance with the goal of neutrality sought by philosophy, Korsgaard's vision of identity, like Murdoch's, does not engage with issues of sexuality and gender. Yet it seems likely that these factors cannot be erased from agent identity, and will affect the relation to the normative world.[21]

When the three conditions of normativity are considered in relation to the novels and contextual law studied, there is a notable degree of correspondence. Tess conscientiously finds her moral decisions endorsed in terms of her identity as daughter and as wife, to the point of endangering her happiness by confessing her 'impurity'. When she is forced to live a moral identity radically divergent from her genuine reflective identity, she drifts 'like a corpse upon the current, in a direction dissociated from its living will' (*Tess*, p 467) – or, in Korsgaard's phrase 'what amounts to death – not being ourselves anymore'. Both Woolf's text, and *The Viscountess Rhondda's Claim* demonstrate the sexes – on both side of the table and the judicial bench – striving to maintain a balance between deep identity,

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21 Eg, women have formed a minority in criminal statistics. Though the statistical balance is changing, we may still consider whether the difference reflects aspects of 'natural' or 'nurtured' identity in the feminine, in turn affecting responses to normativity. Repressive – but extremely effective – socialisation of girls in the past has doubtless influenced this bias; in the West the changing statistical frame suggests at least some content to the 'nurture' side of the identity divide.

whether through art or law, and conventional obligation which persuasively 'apes' or seems to concur with the moral. Greene and Bowen present us with characters who constantly refer 'outwards' to the broader moral code. The apparent fracture and inversion of broad metaphysics forces the individuals to realign their political affiliations in order to preserve the correlation between personal moral identity and broader moral structures: precisely the same process appears to be at work in the mind of William Joyce. Facing death with equanimity, Joyce demonstrates identity with 'his' moral code is more significant than death. Both Fowles and Murdoch approach the question of reflective endorsement with a more developed focus upon the need to transcend the contingent where possible. This transcendence is facilitated by (loosely termed) 'existential' consciousness – consciousness of superficial convention, of mortality, of aloneness: though Greene and Bowen approach the issue, it is in *these* books in particular, that Korsgaard's warning is explored – that evil springs from the conscious reflective decision to ground the moral life in *contingent practical* identity. Coetzee's *Foe* occupies a different realm. Somewhere between the traditions of political satire and allegory, it is an extended remonstration with the generations and institutions which, perhaps unconsciously, have pursued inauthentic engagements with the normative question. Yet though this text is the most acerbic disavowal yet, alignment with Korsgaard's rationale is a timely reminder that the empty terraces, the split tongues, the erased histories of Cruso's island (and of corresponding philosophies) must have seemed, at least in part, to be endorsed reflectively by the 'selves' occupying that history and those belief systems. And this is a key problem with the relation between objective normativity and personal moral integrity. For clearly the two may *appear* to be harmoniously aligned from the subjective viewpoint. The 'contingent practical' identity may masquerade very effectively as a universal and indeed one might argue that only the philosophical elite are fully equipped to distinguish the two. With *Disgrace* we witness the stripping away of a contingent practical identity which *has* so masqueraded, leaving in its wake a man whose reflective endorsement restores genuine integrity, but in a contingent world of moral instability. Finally, in *Super-Cannes*, the corporate, the age of materialism, facilitates the credibility of a skewed normativity that seems to be 'reflectively endorsed' by pseudo-scientific cynicism and the preservation of corporate goals. The cultivation of selfhood is sacrificed to transitory gratification serving corporate profits. As Ballard comments:

> There are none of the social tensions that force us to recognise other people's strengths and weaknesses, our obligations to them or feelings of dependence … no interplay of any kind, none of the emotional trade-offs that give us our sense of who we are … there's no need for personal morality … the more civilised we are, the fewer moral choices we have to make … (*Super-Cannes*, pp 253–55).

But, he warns:

> … part of the mind atrophies. A moral calculus that took thousands of years to develop starts to wither from neglect. Once you dispense with morality the important decisions become a matter of aesthetics … Societies that dispense with the challenged conscience are more vulnerable than they realize … The ultimate gated community is a human being with a closed mind. We're breeding a new race of deracinated people, internal exiles without human ties but with enormous power … (p 256).

Here Ballard suggests that not only the ability to respond to normativity through reflective endorsement may be gravely injured by an impoverished moral environment, but also that recourse to a 'contingent practical' identity may itself become endorsed in the loss of the social network of obligations. Ballard identifies the emotional aspect of the road to normativity, the 'interplay' and 'emotional trade-offs that give us our sense of who we are'. Howsoever its roots may be found in a not-so-distant origin as a 'reformed hunter-killer of depraved appetites' – which sounds rapacious *inwardly* as well as outwardly – Ballard is describing a vulnerable, fluid psyche.

Thus, although Korsgaard's analysis of 'deep' identity concurs with the stubbornly persistent suturing of selfhood exhibited by individuals both in the texts of literature and law, it is perhaps too prescriptive in its assertion that such selfhood is essentially stable and strong. Her argument proceeds in the following way:

> It is the key conceptions of ourselves that give rise to unconditional obligations – to violate them is to lose your integrity, and so your identity, and to no longer be who you are ... if reasons arise from reflective endorsement, then obligation arises from reflective *rejection* ... An obligation always takes the form of a reaction against a threat of a loss of identity, but there are complexities regarding identity –
>
> (1) Some parts of our identity are easily shed and, where they come into conflict with fundamental parts of our identity, they should be shed.
>
> (2) Because of the *stability* not *fragility* of identity, the agent may violate the law that she is to herself, making an exception of the moment or the case ... We cannot make an exception 'just this once' every time, or we will lose our identities after all ... That, by the way is why people even with the most excellent characters can *occasionally* knowingly do wrong ... (p 102).

Korsgaard here implies that the stubborn suturing of selfhood evident in the repeated assertion of 'deep' identity links to a 'stable' rather than 'fragile identity, which is an inversion of Ballard's construction. The key seems to lie with that disputed territory of 'the psyche' and its role in mediating between the construction of self and the normative world. Just as jurisprudential constructions of links between models of human nature, the psyche and free-will have been forced to hypothesise the gaps opening between knowledge and rationality by *asserting* the model which appears to have the greatest degree of 'fit', so Korsgaard too is forced to construct links between the gaps. Though she is circumspect and measured in her analysis, adopting as disinterested a position as possible:

> ... accepting the role of nature in the construction of our values, and so accepting the element of arbitrariness and contingency that lies at their basis, does not commit us to accepting everything that nature provides or to being unable to distinguish the sick from the healthy ... we sometimes find that there is nothing more to say than that is what nature and history have made of us ... (p 253),

her implicit *ordering* of the relation between nature, nurture and the development of the free-willing individual suggests the overmastering potential of the self which concurs with her assertion of a 'stable' rather than 'fragile' identity:

> Our contingent practical identities are to some extent given to us, by birth etc – but it is also clear that we enter into their construction. And this means that the desires and impulses

> associated with them do not just *arise* in us. When we adopt (or come wholeheartedly to inhabit) a conception of practical identity, we also adopt a way of life and a set of projects … in some cases our conception of a contingent practical identity will give rise to new motives in a way that parallels the generation of the motive of duty by the thought of the categorical imperative … (p 239).

Yet again, the 'gap' between nature and nurture has been filled with an individual of such free-will and autonomy that logically *must* lead directly to the moral life. Korsgaard recognises that a morally derelict contingent practical identity may seem perfectly consistent with a 'skewed' notion of inner 'integrity'. But she argues, once the dereliction is identified as *inconsistent* with the moral self – a self who *must* reside in all of us because of our ineluctable relation to the social context of selfhood as well as to the world of virtue – the road to normativity is inescapable.

CAVE WRITINGS

Now philosophy, like jurisprudence, is forced to abstract from the particular to the general and, as with all scholarship and – the moment of writing *this* text included – this can only be embarked upon from a privileged and rarefied vantage-point. Certainly from an *aspirational* point of view, it is to be hoped that the road to normativity can be made clear to the most concerted miscreant and arguably we should organise our society accordingly, so as to make that road accessible to all. Yet though Korsgaard acknowledges that philosophy of normativity should not 'duck' the continued pursuit of a distinction between 'the sick and the healthy', the construction of a *predominantly* stable, free-willing, autonomous individual whose role in self construction 'trumps' that of preconstruction, *assumes* an inordinate degree of 'health' and stability. Though scholars have the luxury for the moment of being able to stand back from brute determinism and the requirements of mere survival and reflect upon how we might cultivate ourselves, though philosophy questions what this short existence *might* mean, and it is meet that the question should be asked with more passion in a time when there is a mass abandonment to a consumer identity which will tend to the base, the questions should not *only* be kept alight in the cells of academe. Nor should they be *thought* only from that perspective. For the 'reality' of social and psychological frailty *as experienced by those beyond*, and of the interaction between contingent social and psychological conditions and the 'given' factors of nature, may be less easily spirited away.

This book began with the contention that of the many epistemologies, philosophy has inbuilt, 'systemic' reflexivity, in that by its very nature it must identify its own structural rationality, its own suppositions. To the extent that philosophy does attempt to examine 'universal' questions *and* to the extent that it attempts to separate issues of fact from issues of value, this holds well. But remember again Murdoch's warning – that fact and value cannot always be separated. Moral philosophers, Murdoch and Korsgaard amongst them, proceed on the basis that sexual identity factors out of the philosophical equation. This neutral point of origin forms the claim to objectivity of most epistemologies, including law, where modifications are piecemeal, grafted, the claim to objectivity the face of privileged dispensation. To the extent that sexual identity is formed by cultural factors, the neutral approach to normativity is resolved, for example by Korsgaard's argument

that the 'deviant' would be obliged to recognise the virtuous life as the only life, in the light of reflective endorsement. This assumes that moral identity is ultimately derived from socially embedded being. No community can be sustained by collective deviant or evil behaviour (from the perspective of utility, this would kill the body of the host community; deontologically, the 'deviant/s' would be isolated by the inherent failure to commune with the moral world). One question is how such reflective endorsement, born of 'ideal' conditions, gets transplanted to the material and cultural context of the 'deviant'. In addition, we cannot know how far certain cultural factors are less than entirely mutable, although anthropology – and imagination – suggests a broad case for possibility in terms of gender, race, of politics itself.

Murdoch reminds us ((1999), p 96) that we should sometimes return to the Cave. This exploration of literary and legal life models has to some extent done so. How tenable is the classical philosophical and jurisprudential negation of gender in the journey from the Cave? Yes, we are all chained facing forwards, all equally susceptible to misinterpreting the shadows on the wall, all prey to the questions of existence, of 'good' and 'evil', inequalities of intelligence, wealth, character, as the literary texts suggest. But the unknown nature-nurture interface for men and women reminds us of obstacles within ourselves to reading the shadows and moving towards light. To the extent that *nature* positions men and women differently in the Cave, this may affect perspective upon the shadows and the light – not intellectually, but where intellect meets any possible *inescapable* aspects of biological location. To the extent that *culture* positions men and women differently in the Cave, we may say the following: where disadvantaged groups have had additional obstacles placed in their path – less access to education, such factors have until recently been naturalised as *intrinsically* rather than extrinsically, derived. These additional obstacles have placed such individuals in an 'ante-cave', whilst dominant beings (usually men) have by their greater strength alone been able to take up strategic positions (apparently at least) nearer to the Cave entrance, to the light – in so far as light is knowledge leading to wisdom. When Murdoch comments ((1999), pp 100–01):

> The impulse to worship is deep and ambiguous and old. There are false suns, easier to gaze upon and far more comforting than the true one. Plato has given us the image of this deluded worship in his great allegory ... The fire, I take it, represents the self, the old unregenerate psyche, that great source of energy and warmth. The prisoners in the second stage of enlightenment have gained the kind of self-awareness which is nowadays a matter of so much interest to us. They can see in themselves the sources of what was formerly blind selfish instinct. They see the flames which threw the shadows which they used to think were real, and they can see the puppets, imitations of things in the real world, whose shadows they used to recognise. They do not yet dream that there is anything else to see. What is more likely than that they should settle down beside the fire, which though its form is flickering and unclear is quite easy to look at and cosy to sit by? I think Kant was afraid of this when he went to such lengths to draw our attention away from the empirical psyche ...,

might we choose to read this as a warning, not just against reliance upon reassuring structures in general, but specifically that retreat to a feminine essence is an aspect of this 'old regenerate self' – for men and for women – and, as Fowles indicates, there is a primal desire to sit down beside it? That this, along with other false suns, is encrypted in jurisprudence and philosophy most tellingly in the partiality aping neutrality, or, for

Murdoch and Korsgaard, the neutrality which elides those aspects of being which may exceed the parameters of mere contingent, practical identity?

I am not going to suggest a happy ending where all along the 'real' light was to be accessed not by force but by a combination of acquiescence and piety and that therefore, women's 'disadvantage' put them at an advantage. Both men and women the world over exhibit the gamut of virtues and vices, more or less, their differences perhaps owing something to luck as well as judgement, possibly to 'primal' hierarchies as much as natural disposition. But in so far as that unknown core of nature-nurture may locate us differently in the cave, with different perspectives, the clear possibility that this may allow us all to contribute different insights should be celebrated and protected. Since we will probably *never* know the 'core' of the nature-nurture conundrum and therefore, to what extent our identities are given, and free-will an illusion, the argument that the base position for *all* should be 'personhood entire' seems persuasive, leaving women and men free to explore and develop potential in a way which subscribes to the aspiration of maximum *reflective* freedom, without the constraint of biologically determined identity inscribed by culture. Perhaps the 'essences' imposed upon woman and her possible locus to the maintenance of 'reality', masculine *and* feminine, reflect not only an arrogation of power (which privileges certain persons as 'dynamic' whilst maintaining others as 'static') but also a fundamental psychic frailty, more evident in men by dint of *their* biological and cultural location. So, the process of leaving the Cave, of seeking the light, morality, is more 'tenable' when some totem is preserved. Woman has been perfectly positioned to supply this need, the return to the Cave, to the primal scene, endorsed.

Murdoch's location of the domestic site and origin for moral philosophy reflects the play between our public and private normative 'selves'. Historically, the domestic has been the site of feminine 'location', the ante-room in the Cave endorsed by incidental requirements such as mothering. Murdoch does not however entrench this aspect of identity – feminine identity – as material to processes of moral philosophy. Insofar as personhood entire is the only ethical position for all persons to adopt, one to the other, so minimising the deceptive effects of the shadows, this is the most tenable perspective for the development of normative discourse and normative ethics – perhaps the rationale behind Korsgaard's mindset. Only thereafter can those aspects which may, *intractably*, be peculiar to the biological position of each sex begin to be appreciated. We have not, in known human history, yet reached such a position. Since we cannot entirely know the point of collision between fact and value, especially in relation to 'human nature' and therefore our moral selves, we cannot be sure of our potential to fully assess the moral question in the light even of an *ideal* reflective endorsement. But since rationality is the only quality available to us in the pursuit of the good and in the cultivation of the good, it behoves us to institute a maximised autonomy, as reflective *responsibility*, in all persons.

Overall, Korsgaard's vision of the integrated self certainly seems to offer a sustainable piece in the jigsaw of which our moral agent is composed, nor should society indulge endless mitigations on behalf of the frail psyche. Yet if society – and the law – is to engage *effectively* with the conception of the individual, full recognition must be paid to understanding *which* aspects we adopt instrumentally in terms of metaphysics, politics, law, and which aspects are borne out by experience. If present philosophy reflects a movement away from the culture of utility which has dominated the 20th century, towards a deontologically-based rationale, there is perhaps a danger that the concomitant

assumptions concerning the characteristics of the moral agent will become ensnared by uncompromising and stony Kantian expectations quite as harsh as some of the more punitive theological models.[22] If the agent of consequentialism has been lacking in moral fibre, the deontologist may yet be choked by it. Preservation of the value placed upon the other via the categorical imperative – not to use him or her as a means to an end is laudable; the *imposition* upon the other of deontological demands, absent the compassion of context, quite another thing.[23]

The quotation from Ballard regarding the intimacy of links between the moral life and social relations suggests a profound alternative to the traditional 'sourcing' of morality from the external claims of either God or a higher moral realm, such as that of Plato's Forms, which exist in the real outside the Cave, beyond the world of 'seemings' and shadows on the cave wall. Korsgaard's exposition of reflective endorsement is located in this social fabric; when she explains that:

> ... normative concepts exist because human beings have normative problems ... o it is true that the assumption of a realm of inherently normative entities or objective values is not needed to explain the existence of normative concepts, or the resulting existence of a category of normative truths ... it is ... because we are normative animals who can question our experience that normative concepts exist (pp 46–47),

this evaluation has little meaning, as Korsgaard recognises, without a social context. The combined experience of an age of 'existential' vertigo and uninhibited materiality arguably motivates the realisation that values – 'forms' – have a more pressing claim to reinstitution than ever before. Ballard provides a social anthropology for the loss of values – 'part of the mind atrophies' – uncannily close to Humean theory. Scruton summarises ((1994), p 291):

> We are motivated, Hume argued, only by our emotions ('passions'); reasoning, which may define the object of a passion, cannot provide the motive. This must arise from another source. Hence, if morality has a motivating force, there must be moral emotions, which are the true centre of the moral life ... For Hume ... the question of moral motivation becomes clear, once we distinguish two kinds of passion: those based in self-interest, and those based in sympathy. The latter are generally fainter ...

The latter are also the beginnings of any more elaborate moral realm, moving us from primal, animal sympathies to reasoned normative ones. But, Ballard suggests, if no opportunity for such values arises – if we are deprived of basic affections, ties, loyalties (as are many at present, whether prostitute or executive, abuser or abused) – normative claims become skewed or diluted along with sympathy. And the possibility of the psyche having a constitution more frail than strong suggests not only that some more easily fall prey to persuasion 'out' of the claims of morality – because never fully internalised – but that for *some* individuals, there is a basic incapacity where the relation between the emotional and moral life is concerned. Traditional medicine and psychiatry has located such a situation as 'psychopathy' – the individual incapable of 'empathising' with the

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22 For a discussion of a potential reworking of Kant in the light of aesthetics and postmodernism, see Ward (1995a).

23 For a discussion of difference theory, especially with regard to feminist and 'critical race' implications, see Richardson, Janice (1998).

pain of others, experiencing instead simple fascination or gratification. But Ballard's recognition of a collective capacity for such fascination returns us to a salient revision of how we might view ourselves, whether male or female.

Meaningful moral philosophy *must* recognise the inter-related moral and social claims made upon philosophy by 'feminist perspectives', *just as* 'feminist perspectives' must engage with moral philosophy. Yet making assertions about the provenance of 'feminine' natures and 'masculine' natures is just as tenuous an exercise as that concerning 'human nature'. Again, rather than filling the void with 'idealised' or 'debased' assumption of each, it may be more helpful to think in terms of the spectrum of human tendencies and capacities. Yet nor should we continue to think merely in terms of the functional identities of limited creative and moral potential which locate us firmly at the back of Plato's cave. The concerns of philosophy, metaphysics, jurisprudence are universal concerns because we share our tenuous existence and the mysteries attendant upon that enigmatic condition. The recurrent theme of the 'dead sister' – actually identifiable throughout these literary texts – is important in many ways, not least because she not only shares the concerns of philosophy, but because she may contribute a different perspective for theory. Kramer ((1995), p 295) quite rightly warns that any such project may fall prey to a collapse of 'the metaphysics/mundaneness split' where feminist theorists are:

> Expressly preoccupied with concepts and with modes of analysis that extend to males and females alike, the reunderstood 'criticisms' of objectification have debarred themselves from employing their central concepts and analyses to distinguish the roles of men from the roles of women ... if paradox-highlighting approaches and metaphysics/mundaneness caveats are to work their salutary effects on our participation in sundry discourses, we shall have to let our modes of participation be *colored* and *informed* by the emphasizing of paradoxes and the metaphysics/mundaneness split; hence, we ought to recoil from facile efforts to *equate* any of our ultimate concepts with our less-than-ultimate concepts. Germane connections must be connections of inclining and steering rather than of equivalence.

In so far as identities denied and identities imposed in *material* terms contribute to any difficulties there may be in resurrecting her, Kramer is right to warn that questions of identity vis à vis equality, of cultural identity vis à vis sexual identity are problems shared by men and women alike and resolvable in practical, physical, as opposed to metaphysical terms. But suppose (and let me flag up that this is *only* a 'suppose') that the identifiable differences in male and female *neurological* organisation actually means that the path to metaphysics might have realised some very different perspectives had women had access to epistemological constructions? After all, looking back over philosophical developments even of the last century, we can see that the twists and turns are in themselves as much idiosyncratic as logical. And even if we avoid the dangerous road to essentialism indicated by hypotheses concerning neurophysiology, the accretion of feminine outlook towards one half of the identity 'spectrum' might have realised different contributions in terms of metaphysics. The philosophies of now are not the *only* and inevitable products of rationality, but may be partial realisations of the range of rationalities hitherto suppressed.

Kramer quite rightly also points out that feminist theory placing too much emphasis upon the lack of agency experienced by women may fall prey to an assumption of total passivity on the one (feminine) hand, and total agency on the part of the masculine. Clearly there are 'assertive' women and 'passive' men and, more importantly, neither sex

operates in a 'vacuum' of agency, unaffected by environment. It is with this partly in mind that the texts studied herein were chosen for a 'universal' philosophical theme with common and disparate implications impacting upon the sexes. As Kramer expresses it:

> Just as everyone male or female must submit as an object to the totalising dynamic of consciousness in everyone else, so everyone in turn as an agent must continuously produce this totalising dynamic through the stream of his or her own perceptions. Events in a woman's consciousness must perform the same basic role within the structure/event antinomy as the role performed by the events in any man's consciousness (p 293).

However, Kramer goes on to argue that:

> ... political or social dominion and political or social abjection never truly equate with metaphysical presence and metaphysical absence ... Just as the condition of gruelling thraldom exists perforce as a mode of agency rather than as the blotting out of all agency, the exclusion of females from a host of activities will involve the siting of the excluded persons in other contexts. So long as excluded persons do not taste death, a highlighted absence in particular spheres can only mean a highlighted presence in the spheres to which the excluded persons have been consigned. Although this highlighted presence nearly always reeks of political and social degradation, the degradation is indeed very much a form of highlighted presence – a form that owes its specific taint not least to the highlighted exclusions and absences that prevail in contexts which shut their doors to disfavoured groups ... (p 310).

Now this 'location' of the disempowered-as-agent accords with Kramer's broader jurisprudential position in terms of 'rights' discourse.[24] But the argument is not persuasive. Certainly it is true that disempowerment *per se* does not necessarily predicate a complete erasure of agency, nor is it the exclusive experience of 'the feminine' insofar as women *and* men may experience disempowerment. But the insistence upon agency at all points of existence *unto death* is questionable – 'thraldom' may involve not only such constraint upon action as to make agency meaningless, but a skewing of identity pursuant upon location in thraldom. Though men and women alike may experience 'thralldom', impotence of identity is peculiarly *inscribed* in the 'being' available to women almost universally, a 'normalised' relation to a 'skewed' normativity. This in turn 'skews' the normativity – the response to the world of obligation – experienced by men. Kramer's assertion of death as the only *locus* of destroyed agency is interesting when placed alongside Korsgaard, whose theory accords with the recurrent textual evidence that identity and agency are so crucially interlinked as to transcend the apparent supremacy of death.

Thus, the contemporary texts of literature challenge those of philosophy. Resistance to the 'contingent practical' identity – which produces 'insufficiently reflective' moral choices – is itself intimately linked to the incidental environment of the moral subject.[25] Simply, though Korsgaard's theory is pivotal in our orientation of the moral subject – ultimately, of the legal subject – the 'unknown' aspects of human nature and the psyche come back to haunt us. Ballard suggests a direct link between the withering of personal moral capability – the ability *to* 'reflectively endorse' – and the alienation of – in this case

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24 See Kramer, Simmonds and Steiner (2000).

25 Consciousness of this interactive relationship between ethics and the subject is present in literary theory – see Harpham (1995).

'advanced' – society. Korsgaard's adumbration of the term 'evil' to the subject of such a *mesalliance* is one reading of the situation, adapting the language of fundamental metaphysical oppositions. But the role of those aspects of *homo sapiens* as yet poorly understood – of nature, and the psyche – may have a more complex significance in terms of our understanding of the moral life. Clearly, though as humans we cannot be utterly exonerated for wrongdoing, neither should we complacently perpetuate the classical polarities which have produced poorly tailored myths, of evil, of nature, of gender, of reasonableness, of responsibility.

Korsgaard's model of the unified self becoming integrated with the external moral order through the metabolisation process of reflective endorsement *does* seem to be largely borne out by this study. But the link between psychic and moral fibre is not so well accounted for. The apparent tenacity of the self as unified entity may reflect not strength but frailty – whole to the observer's eye, even to the subject's own 'inner' eye, but analogous more to the cytoplasmic 'streaming' of the amoeba than the finely tuned or finely directed unified self. Furthermore, the model is in tension with the model of ethical personality offered by Murdoch, where the individual capacity to 'learn' or be receptive to the process of reflective endorsement is affected not only by contingent, historical externalities, but also by innate personal potential for moral growth. Issues of class and race – black and white, of gender – male and female, of physical and intellectual weakness, may place additional 'barriers' between the individual caught in the already skewed world of his contingent 'present'. It is the work of politics and law to minimise the effects of such obstacles to normativity. Absent those factors (and how separable they are is a moot point) the probable 'register' of moral *receptiveness* outlined by Murdoch – the relative location of each and every one of us in the recesses of Plato's Cave *and* our capacity to 'free' ourselves from the misleading 'shadows' on the wall – is an alternative and radical ethics model for legal science. In the attempts to create doctrines which embrace a proper balance between the social requirement of 'reasonableness' and individual moral disability – whether transient or permanent, 'provoked' or imposed, consideration should be paid not only to evolving social norms, but to universal human variation. The novels explored herein have shared with jurisprudence and philosophy a common concern for the moral life. In doing so they have also demonstrated – in common with jurisprudence and philosophy – a position of relative 'privilege' in terms of opportunity and vantage point for reflection upon the moral life. The worlds of law and of fiction deal more often than not with the world of 'little' people, people who experience limited autonomy or opportunity for social or intellectual growth. Gender, race and class have all formed loci for the imposition and entrenchment of such 'littleness'. The tendency for women and children to have become units of consumption in the social order is as damaging for them as it is a fatal diet for the consumer. Failure to address such issues through *material* as well as ideological change represents a collective dereliction of morals. Addressing such matters will go some way towards correcting the skewed normativity produced by the world of the 'real', so minimising the retreat into alienated or deviant behaviour by the marginalised individual. Location at a vulnerable point in Murdoch's 'register' of moral receptiveness is a more difficult issue for collective policy, requiring at the very least consideration of a reorientated, central and accessible focus for cultivation of the moral individual: Government investment in 'citizenship'

classes for children would seem to be inadequate to the task.[26] The ability of legal science to 'locate' such vulnerability is open to question, as is the proper limit to be placed upon doctrinal indulgence of such a notion. But the model is intriguing and poses a real ethical challenge to contemporary life in the wake of the declining influence of traditional values. And it should not be assumed that climbing to a higher vantage point, whether the judicial bench or the philosopher's stone, *necessarily* equips the individual with a more effective or objective view of the entrance to the cave – indeed the reality may be quite to the contrary.

The exploration of texts through the 20th century has demonstrated that for each period, the combination of focused advances in thought with a rationalised status quo were all reasonable from an 'internal' point of view. Each was innovative for its time, each shaped by persons of integrity. For each period, a 'liberality trap' is identifiable in some form, where the perceived threats posed by some changes are 'traded off' against tenable, even daring, changes elsewhere.[27] Claims to new forms of power and identity have been particularly sublimated within this trap, nowhere more than in relation to women.[28] Through the century, literature becomes more aware of simply 'reflecting' norms and of philosophical and ideological links to representations of identity. Jurisprudes too – the juristically popular Hart, Finnis, Dworkin, Rawls – demonstrate a commitment to integrity, to the construction of visionary possibilities expressing values broadly shared by all of us, to the maximisation of fair and just society, whether through identifiable goods, or through the positing of a formula for legality of neutral yet universal application.[29] At a time of glutted materialism, of the pursuit of appetites in a consumer culture often bereft of beauty and propelled at great velocity but with little direction, the concerns of philosophers and jurisprudes have never been more apt. That this speeding culture is accompanied by an existential anxiety reflects not only the need to shape a vibrant and relevant moral life and discourse, but one which is alive to the predominantly affective, rather than rational employment of essentialist views of otherness. Not only are dead sisters and dead brothers alike a poignant waste; they may yet each haunt society with the manner of their disposal. Howsoever the civic agent imagines himself to be the heir to an enlightenment will of vertiginous freedom he should consider the flow of

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26 See van Gunsteren ((1998), p 151):

> There cannot be citizenship if there is no access to it. Citizenship is not a natural attribute of people but a public status with specific conditions of access through education, immigration, and earning capacity or ownership … Education for citizenship is an inherently ambiguous notion, because education requires and accepts inequalities that are inadmissible between full-fledged citizens …

27 For an excellent discussion of this problem in the modern context, see Lacey (1994), especially pp 212–13.

28 See Barnett (1998) especially cogent summary, p 103.

29 See Richardson and Sandland ((2000), p 8).

illusions – of will, of freedom, of existence.[30] And in the possibility that we must shape our moral life in the absence of a certain God there is no paradox. For with the *possibility* of an absent God, the contiguity of our social and solitary selves and the *certainty* of death, there is less room for moral cavilling. With no jealous jostle for reward or punishment elsewhere, no-one to log our purchase of indulgences, we must squarely face our need to aspire to the good for ourselves. Adrift in the cosmos, the unseemly scramble for *things* and for others as things is the most meaningless project of all. For if no-one will come to our rescue, we must build in empty space from our frailties and our moral strengths as we come to know them, aspiring to the greatest good that we can muster from the fragments we collect of our joint humanity. And if in death we find ourselves cast within the eye of omnipotence, there is no need to fear, for we will have acted with integrity with no promise of divine reward, but humanity for ourselves, as brothers, lovers, sisters, children. To the concern invoked by Finnis – in the absence of God/s, from whence does moral obligation derive, Sartre has answered:

> Dostoievsky once wrote 'If God did not exist, everything would be permitted'; and that, for existentialism, is the starting point. Everything is indeed permitted if God does not exist, and man is in consequence forlorn … for if indeed existence precedes essence, one will never be able to explain one's action by reference to a given and specific human nature; in other words man is free, man is freedom. Nor on the other hand, if God does not exist, are we provided with any values or commands that could legitimise our behaviour … (Sartre (1989), pp 33–34).

Yet again and again both legal and literary texts have found the agent responsive to moral aspiration howsoever displaced by the frail psyche. Korsgaard's moral agent, endorsing the moral life – the normative in reflection – presents a logical human potential as well as desire for metaphysical promise. Bringing this being into greater alignment with the frailties, the faults, the gifts of the human psyche, of persons as we discover them to be and not as we presume they *ought* to be, will better cultivate the possibility of a moral life. The ought must derive from an authentic *is*. But the is encompasses not just the necessity of salvaging ourselves from chaos, the clear utility derived from individual and collective order. The *is* also shows us more and more to be creatures, not merely of animal passions, but of compassions, compassions which are a potential in us all. Use, in the 1960s, of the rhetoric of 'sickness' and 'cure' may have been a miscalculation on Lady Wootton's part, yet perhaps she was reaching towards a more profound sense of the human condition – that we must attend more intently to human frailty if we are to minimise the infliction of

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30 Murdoch ((1953), pp 55, 68):

> Sartre's play on the word 'freedom' may be a flagrant case of 'persuasive definition'; but it is also a symptom of a dilemma in which we are all involved. For many reasons, the chief of which is that science has altered our societies and our key concepts with a dreadful speed, it seems now impossible for us either to live unreflectively or to express a view of what we are in any systematic terms which will satisfy the mind. We can no longer formulate a general truth about ourselves which shall encompass us like a house. The only satisfied rationalists today … are blinkered scientists or Marxists. But what we hold in common, whatever our solution, is a sense of a broken totality, a divided being … Sartre's philosophy already implies a sort of pragmatism; our being is what we do, our world is a world of tasks. It is in connexion with politics alone that he is able to conceive a universal value for this 'doing', which otherwise remains caught in the privacy of the individual project …

suffering one upon the other, man, woman and child. If we have lost or misplaced God, the conclusion that, in his absence, 'Death refutes induction – there is no "it" for it all to be about' can so easily presage the failed normativity of existential collapse, the victory of anxiety, nihilism, fatalism – Murdoch herself touches this critique of existential anxiety in her philosophical text *The Sovereignty of Good*. But the texts unfolding over the 20th century suggest an alternative and novel depth to our notion of humanity and the moral agent. The social experiment that is life continues, under terrible threats, but also with a newly emergent coupling of humility with integrity, a humility and integrity springing from our very nakedness, our littleness, our new found mutuality of selves, for whom death is transcended in the aspiration to exist, to act, with meaning.

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